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THE PROBLEMS AND SOLUTIONS OF CHANGE IN CONCEPTIONS
OF THE RULE OF LAW IN THE SEVENTEENTH CENTURY:
EVOLUTION OR REVOLUTION?

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ABSTRACT / LAY SUMMARY

The Rule of Law is one of the most important, and most contested, political concepts. The ideas of thinkers—who are frequently taken to be responsible for canonical statements relating to the Rule of Law—are frequently used to illustrate the existence of similarities and differences that both identify what the Rule of Law is and delineate the conceptual boundaries of the concept. In citing these thinkers, the underlying assumption is that the Rule of Law can be seen as a single, diachronically conceivable, concept that has evolved over time. I question both of these practices. Considering Rule of Law conceptions in a superficial sense—by considering only thinkers’ accounts in the absence of their authoring context—fails to appreciate nuances and inflections that can fundamentally alter perceived similarities or differences; where various canonical accounts can no longer be seen as reflecting the same ideas, the assumption of a single, evolving, idea of the concept of the Rule of Law as drawn in contemporary conceptual discourse cannot be sustained.

I conduct a contextualist examination of two accounts frequently associated with the idea of the Rule of Law: Hobbes’s *Leviathan* and Locke’s *Two Treatises of Government*. To place these in context, I adopt a problem / solution approach. I consider their texts as reflecting solutions to problems that existed in their societies at the time they were writing. To expose the associated problems, I consider pamphlets that were popular at that time. By clearly identifying and associating the Rule of Law solutions with the relevant societal problems, a more nuanced appreciation of the accounts is achieved.

By identifying inflections in Rule of Law solutions, it becomes possible to disambiguate between superficially similar ideas. By disambiguating in this way—and by illustrating superficially similar accounts are fundamentally different in their nature—I argue there is no necessary conceptual connection between the Rule of Law accounts provided by Hobbes and Locke. I also argue that this difference is sufficient to show that, at least between these two ‘canonical’ accounts, the assumption that the Rule of Law has evolved cannot hold; change across Hobbes’s and Locke’s conceptions of the Rule of Law has occurred not by evolution, but by revolution.

DECLARATION

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

This thesis contains two chapters that reproduce—in an amended form that addresses the original argument contained in this thesis—arguments that have previously been published in law journals. The chapters, and the journals, are:

Chapter 1: *Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics*. The substantive content of this chapter, and the argument, was published as:

Paul Burgess, *Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics*, 9 Hague J. Rule Law 195-209 (2017). I have obtained permission to reproduce this chapter.

Chapter 3: *The Rule of Law: Beyond Contestedness*. The substantive content of this chapter, and the argument, was published as:

Paul Burgess, *The Rule of Law: Beyond Contestedness*, 8 Jurisprudence 480-500 (2017). This article is open access and I retain the copyright. No permission is needed to reproduce it as I cite the article source.

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Date..28.1.01.19.

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I commence my thesis with two words: 'Origins matter.' This is never more true than in relation to this work. Whilst the research is all mine, my work has been supported, inspired, motivated, and improved by the people around me. I owe them all a great deal of thanks. My best friend, who is also my wife, has supported and encouraged me through this entire process. Without her support—and I don't just mean financial!—I would not be in a position to write these few words following the completion of the other 80,324. Hal and Spike have only ever known a dad who is at school; whilst having a dad with a job will be a shock, I'm sure they'll forgive me for that. Whilst it may sound like a cliché, they inspire me every day. They inspire me to learn, and to know more, and to stay curious. One day, I hope they'll understand why I spent so many weekends locked away in the study. I also must thank my parents; whilst it may be trite to point it out, I wouldn't be here without them.

No mention of support would be complete without making reference to the generous financial support that I have received from both the Modern Law Review, and the Institute of Humane Studies. Two years of scholarships from the MLR, and a year's fellowship as a Bernard Marcus Fellow from the IHS aided the financial stress on me, and the commensurate burden on my family. The organisations' generous support of my academic endeavour was not only gratefully received, but also meant I could focus on my work. My thesis would not be complete, and maybe wouldn't have been completed at all, if it wasn't for their assistance.

I've been fortunate enough to receive academic motivation and assistance from a number of quarters. At the top of this list are, of course, my supervisors. Claudio: thanks for pressing me to be ever clearer, and for trying to make sure that when I'm wrong at least I'm *clearly* wrong. Paul: I will continue to defer to your expertise in relation to the spelling of 'Aristotelian', but it still looks strange to me! This journey began on the first day of my LLM at NYU with a Rule of Law class taken by Jeremy Waldron and expanded to a thesis that he was kind enough to supervise. The world of academia can blame Jeremy for my massive over-enthusiasm about my topic. I have also been enormously fortunate to have the chance to meet and share ideas with Brian Tamanaha. Brian's immediate academic kindness and generosity to a near-stranger—albeit an enthusiastic one—who happens to share a research interest has been a constant reminder about what academia should be. The bounty of riches continues through the many (many) chances that I have had to pose 'just one quick question' to Neil Walker. His constant refusal to meet my quick questions with quick answers has been a particular joy and a constant reminder of not only how far I have to go on my academic journey, but also as a reminder of what I should do and how I should be once I get there. I can only hope that in my own future I can provide a fraction of the motivation, and can show the same kindness, that I have been fortunate enough to receive from each of these individuals.

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yet to figure out how to share coffee via an iPhone (without causing electrical problems).

No mention of motivation would be complete without mentioning the Legal Theory Group members and, in particular, the passionate, determined and tireless convenors of that group during my time in Edinburgh: Joaquín, Rick, Lucas, and Martin. The substantial requirements of the role—whilst acknowledged by many—are largely under-appreciated. The events, seminars, Festivals, and WiP sessions over the last few years have given me more ideas (and headaches) than I can care to mention.

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Finally, it is safe to say that I would still be languishing in the academic doldrums with ill-conceived and half-formed ideas if I hadn't been pushed, pressed, prodded and persuaded to consider, and re-consider, my thinking in ever greater detail by my partner-in-kebabs, Lucas.

All of these people have contributed in some way to the completion of this thesis. Their support, inspiration, and motivation made it what it is. (Except for the errors. They're all mine).

As I said, origins matter.

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CHAPTER 1:
NEGLECTING THE HISTORY OF THE RULE OF LAW:
(UNINTENDED) CONCEPTUAL EUGENICS¹

INTRODUCTION

Origins matter. In our everyday life—both consciously and subconsciously—we value things based on their origin. We may do this in various ways and in a variety of settings: in our selection of food; in electing the school our children should attend; in the identification of which dog we should buy or which racehorse to bet on; or, in deciding which paper we should advance to the top of our reading pile. This assessment may be for moral reasons (the purchase of a Fairtrade or similarly ethically sourced food item), for financial or quality-based reasons (in sourcing an animal with a known pedigree), or in relation to a prior or perceived level of academic rigour (regarding a school or a known academic journal). Yet, it is clear that, whilst origins matter, consideration of origins *can* be applied for wrong

¹ The vast majority of this chapter is derived from my published article: Paul Burgess, *Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics*, 9 HAGUE J. RULE LAW 195–209 (2017). Minor amendments have been made to facilitate the argument in this thesis.

reasons. Assessment of the value inherent in origins can also be, and has been, controversially used in structuring eugenics programmes and in all aspects of racism. As is well known, however, the virtue of any tool's use—and this is something I will return to later in this chapter as well as in Chapter 3—should not be marred by its use for potentially evil ends.² Of course, regardless of how or for what purpose it occurs, in each of these examples there is some consideration of a perceived level of value. In some circumstances—and in many of the circumstances that I will outline in this introductory chapter—this value can take the form of an enhanced perception of the legitimacy of the *thing* being considered. Here, I provide a justificatory argument for the importance of the endeavour exemplified by the remainder of this thesis. In making this argument, I suggest that consideration and assessment of the origins of the concept of the Rule of Law not only matters, but also that it is a practice that is often neglected. Further, I suggest, neglecting the origins of the various frequently cited conceptions of the Rule of Law has the potential to result in (unintended) conceptual eugenics.

The concept of the Rule of Law has been increasingly studied in recent years. It is relevant to question whether there is anything left to explore. What

² JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 225–6 (2 ed. 2009).

can be said about the Rule of Law that is truly original? By framing my discussion around history, and by taking a broadly interdisciplinary approach, I explore a wealth of original ideas. I pose a basic research question that facilitates a much deeper discussion: *What is the nature of the change across Rule of Law conceptions?* This broad question leads me to pose and answer a number of sub questions: What forms of change can / did occur? What does 'the Rule of Law' mean? What conceptions are 'Rule of Law conceptions'? In answering these, and other, questions, my original contribution is dispersed throughout the following six chapters. After introducing the broad rationale for the work in this first chapter, I critique the existing arguments and illustrate a fundamental problem that exists in the Rule of Law literature that has previously gone unacknowledged. In doing so, I propose—and execute in the rest of the thesis—an original methodological solution to the problem. My conceptual definition of the Rule of Law proposed in Chapter 3, and adopted across the thesis, stems from a novel process of distilling canonical Rule of Law ideas to get beyond the ever-present status of contestation that dominates discussion of the concept. My application of this definition, together with the methodological solution proposed in Chapter 2, to Hobbes's and Locke's Rule of Law ideas in Chapters 4 and 5—in terms akin to an intellectual history—is also original and represents a delimitation of the boundaries of the research question. It follows that the analysis of these

chapters, in Chapter 6, is also novel. For these reasons, my original contribution comes from both the answering of the broad research question as well as the creation and application of the several novel approaches and methodologies that are developed over the course of the thesis.

A NEGLECTED ORIGIN?

Do we know anything about the Rule of Law's origins? Do we write about the concept's origins? Of course we do. And we do it frequently. In journals and books relating to the Rule of Law, particularly when focus is placed on the concept itself, it is not uncommon—in fact it is actually quite common—to see in the opening sentences, paragraphs, or pages a statement or synopsis of the concept's history.³ In this respect, the history of the Rule of Law occupies a principal position in the literature regarding the concept's content and meaning; yet, arguably, it does not occupy a position of principle. By this, I mean that reference is made to conceptions that are frequently associated with the Rule of Law, in (broadly) chronological order, by way, it seems, of illustrating what the concept of the Rule of Law is or was through some form of progression or, at least, through some sort of 'history'.

³I return to the introductory content of Rule of Law articles in Chapter 2.

Why the scare quotes? The method frequently adopted is 'history', and not history proper, as it simply provides a review of the most frequently mentioned Rule of Law authors, who just so happen to be the authors of texts produced in the historical past. In effect, the 'history' provided is used as an intellectual narrative for, or a conceptual back-story to, the idea. This approach, whilst useful in some contexts, has the potential to substantially misrepresent or misinterpret an author's meaning. Interpretation outside of an understanding of the context in which the text was created risks importing a meaning that is fundamentally different to that intended by the author. I do not suggest that we cannot use an earlier idea to innovate in our own time; after all, doing so may be essential should a new problem arise. What I do, however, suggest is that there should not be a distortion of the original ideas. In these terms, the practice of history, as a particular method, is not a principle that is generally applied to the analysis or consideration of Rule of Law-relevant texts in the Rule of Law literature.⁴ This results in the reliance on superficial references to past Rule of Law authors that result in a misleading

⁴ There are, of course, a number of fields of research in different disciplines—history included—that relate to the Rule of Law in the broadest sense; whilst I do not discount this contribution—in fact, as will be seen, I both welcome and encourage it—I will, in this chapter, confine my comments mainly to the more narrowly defined ideas associated with the *concept* of the Rule of Law.

appreciation of the history of the concept. Accounts that take a more rounded historical approach to the evolution of the concept of the Rule of Law are few and far between. By illustrating this relative neglect, both in this chapter and in introducing my wider thesis, my hope is that the significance of the historical approach to the Rule of Law can be illustrated.

There are many examples of 'history' in the Rule of Law literature.⁵ I mention only a couple here. Many accounts commence by citing Aristotle as the originator of the idea, or by hinting at older origins by suggesting the Rule of Law is 'at least' as old as Aristotle's account.⁶ It is also frequently taken as a standard position that the concept has ancient roots; Møller and Skaaning state, in relation to an oft quoted Aristotelian passage stating that law should govern, '[t]hese sentences were written by Aristotle over two millennia ago (in *Politics*, 3.16), and they go to show that the ideal of the rule

⁵ For an expansion of these, and other trends in the literature, see Chapter 2.

⁶ Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS 120-147, 121 (1994); RONALD A. CASS, THE RULE OF LAW IN AMERICA 1 (2001); THE RULE OF LAW: HISTORY, THEORY AND CRITICISM, 75 (Pietro Costa, Danilo Zolo, & Emilio Santoro eds., 2007); Martin Krygier, *Rule of Law (and Rechtsstaat)*, 38 in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 45-59, 46 (James R. Silkenat, James E. Hickey, & Peter D. Barenboim eds., 2014); Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2016 ed. 2016), <http://plato.stanford.edu/entries/rule-of-law/> (last visited Jul 20, 2018).

of law is ancient.⁷ My identification of a trend of reference to ancient origins is hardly revelatory. In opening his book, and whilst pointing to necessary caution in doing so, Brian Tamanaha acknowledges: 'Many accounts of the rule of law identify its origins in classical Greek thought...'⁸ Consideration of origins is not, of course, limited to the citation of ancient sources. Authors in the Rule of Law literature will frequently go on to cite various 'usual suspects' of the Rule of Law: authors whose accounts frequently also happen to be 'historical' in the sense that they were authored in either the recent or more distant past.⁹ My own, non-scientifically derived and non-exclusive, list of historical Rule of Law usual suspects includes: Aristotle, Hobbes, Locke, Dicey, Hayek, Fuller, Dworkin, and Raz. A slightly different, though not contradictory, list has been described as forming '... a 'Who's Who?' of Western political thought...'¹⁰ Such is the importance and prevalence of these thinkers, I will return to these usual suspects of the Rule of Law literature

⁷ JØRGEN MØLLER & SVEND-ERIK SKAANING, *THE RULE OF LAW: DEFINITIONS, MEASURES, PATTERNS AND CAUSES* 2 (2014).

⁸ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW HISTORY, POLITICS, THEORY* 7 (2004). See also, Julian A. Sempill, *Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power*, 31 JL POL 333, 342-3 (2015).

⁹ Throughout the thesis, I will use 'usual suspects', 'canonical authors', or their cognate phrases, synonymously.

¹⁰ MØLLER AND SKAANING, *supra* note 7 at 2.

throughout my thesis. Whilst more names could be added, these names—and reference to these authors as Rule of Law usual suspects or as producing ‘canons’ of the Rule of Law—will likely be readily recognisable to anyone even broadly familiar with the literature relating to the concept of the Rule of Law.

By referencing these thinkers, and in acknowledging that many of them hail from the dim and distant past, the origins of the concept of the Rule of Law are frequently either implicitly or explicitly alluded to. Whilst explicit reference can take the form of a statement that the nature or content of the concept has changed over time,¹¹ a more oblique reference to historical differences can also be seen. For example, a relative difference between present and past conceptions is apparent in the statement ‘...the precise meaning of [the Rule of Law] may be less clear today than ever before.’¹² The connection between history and the Rule of Law is also apparent in descriptions of the concept that either suggest earlier ideas have some point

¹¹ JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 3–4 (2004). I also explore the idea of change over time as one of the assumptions of the Rule of Law literature in Chapter 2.

¹² Richard H. Fallon Jr., *“The Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REV. 1–56, 1 (1997) (citation omitted).

of difference from contemporary ideas,¹³ or in terms where there has been an acknowledged 'historical evolution'.¹⁴

But why do we do this? Why are so many valuable words used up, so frequently, in the opening of so many books and papers related to the Rule of Law if it is simply to restate things that are already well known? There could, of course, be many reasons: to satisfy general academic curiosity in the reader; to provide a level of rigour to the argument, claim, or assumption being made; to avoid any suggestion that the author is claiming to be proposing a new and previously unstated concept; or, to make clear the precise nature of the Rule of Law that is being discussed—for example, through using previous thinkers' positions to clarify whether a thin or thick conception will be preferred. Another possible reason to focus on, or at least allude to, the concept's history and its origin is to suggest there is something of enduring worth in the concept itself. After all, one could take the position that as it has been used, applied, and thought of by many thinkers in the past, there is value in continuing to think about and apply the concept in the

¹³ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. LAW REV. 781, 781 (1989).

¹⁴ Olufemi Taiwo, *The Rule of Law: The New Leviathan*, 12 CAN JL JURISPRUD. 151, 152 (1999).

present.¹⁵ One final reason—one that is interrelated to all of those just outlined—is that the statement and allusion to origins adds, in some form, legitimacy to the nature and form of the argument being made. The argument represents a form of an appeal to authority. The bolstering of legitimacy in this way *could* relate to the acknowledgement that the argument being proposed in the work is not *totally* original; and I do not mean this in a negative sense. What I mean is that the argument being made is the continuation of a string of intellectual thought or a chain of ideas that is seen—at least by the author seeking to bolster the legitimacy—as bringing ideas together within a single tradition. It is in this way that ideas that have come before are modified, expanded, and potentially improved upon through reapplication. In this sense, legitimacy comes from the support and extension of a previously made, and (perhaps) generally accepted, argument that is already considered as being valuable. In doing this, and although it is

¹⁵ Of course, there are inherent logical problems in applying this rationale; the mere idea that a thought or a position is or was seen as sound, authoritative, or important in times gone by does not mean the idea should be considered a useful or valid point of discussion now or in the future. (This issue underlies the idea behind my thesis.) Notwithstanding this, the fact that there has been previous thought and academic debate in an area is frequently used as a basis for further interjection.

generally not the case that this argument is explicitly made, we take up and use—and innovate with—the conceptual toolkit that is available to us.

But, there can be problems with this approach: Do we know—and do we care—exactly where (or when) the tools came from? What, exactly, were the tools originally intended to be used for? Why are *these* tools in *this* box? And, what exactly did the person who originally deposited them mean to communicate? It is only through answering these questions that the origins of the concept of the Rule of Law—and, hence, the value that the concept has for our present problems and in its present application—can properly be understood and, further, that our future problem-solving ability be fully retained. These are the questions I answer.

The potential neglect of this active consideration of the concept's origins inspired the underlying questions motivating my thesis. I'll come back to this. But, first, I want to outline why the neglect of the Rule of Law's origins can, potentially, have dire consequences.

OUR CONCEPTUAL TOOLBOX

By virtue of the vast array of Rule of Law thinkers—as the usual suspects of the Rule of Law literature—that have come before us, we have a truly massive assortment of tools that can be applied to our own respective

projects. We can, of course, apply the available tools in whatever way we want. But, as a way of framing the justification for the wider arguments taken up in the rest of my thesis, my argument in this opening chapter is that—even if we are going to, eventually, use the tool in a completely new way—we must be aware of, understand, and appreciate the original purpose or intent behind the tool’s existence. As, if we do not understand fully the origins of the various Rule of Law conceptions, then we will not be able to apply the Rule of Law to our contemporary problems in the most effective way.¹⁶ Before going any further, through the use of a very brief, and broadly stated point, I want to illustrate one way in which origins, and the use and amendment of a conceptual tool in the present, can be relevant to the concept of the Rule of Law. Whilst some exceptions exist,¹⁷ contemporary ideas of the Rule of Law

¹⁶ This point echoes one previously made by Krygier—in referring to Cotterrell’s work and their shared views on the Rule of Law—that, in relation to the origin of Rule of Law ideas ‘one learns something, sometimes lots, from exploring those circumstances.’ Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 327–346, 328 (Richard Nobles & David Schiff eds., 2014). See also, ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* (2 ed. 2003).

¹⁷ See, for example, *PRIVATE LAW AND THE RULE OF LAW*, (Lisa M Austin & Dennis Klimchuk eds., 2014).

are intimately intertwined with the idea of the state.¹⁸ The modern-day view and application of the concept of the Rule of Law—as some sort of normative force acting as a constraint upon the exercise of power—is nestled within a state-centric paradigm. However, many of the usual suspects of the Rule of Law formulated their ideas in times when this state-centric paradigm either did not exist, or was not as all-consuming an idea—with respect to the way in which the concept of the Rule of Law operates—as it is now. For this to be apparent, it is not necessary to extend our view back to the city states of Ancient Greece. Fundamental differences in the nature, role, and extent of the state apparatus can be seen even in the relatively recent past. In A.V. Dicey's late-19th century England, the fears he expresses for the decline of the Rule of Law are offered in a context very different to that which exists today. Dicey's Rule of Law idea calls for: the absence of arbitrary power on the part of the government; equal application of the law (meaning no individual is above the law and all are subject to the law); and, judicial decisions to be

¹⁸ For an account of the Rule of Law's significance for the limited government tradition, see Sempill, *supra* note 8. The relationship to the state can exist in either the domestic or the international sphere. Although I do not address the international application directly here, in this respect, see Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. LAW 331–362 (2008). See also, Paul Burgess, *Deriving the International Rule of Law: an Unnecessary, Impractical and Unhelpful Exercise*, (FORTHCOMING).

privileged (as general principles of the constitution result from those decisions).¹⁹ Dicey's perceived erosion of the Rule of Law, and the accompanying rise in the welfare state, underscores the problem that he seeks to solve. In framing his Rule of Law ideas, and in particular ideas associated with the absence of arbitrary power and the equal application of the law, Dicey sees the rise of the administrative state as the (Rule of Law) problem. Accordingly, his (Rule of Law) solution is particularly focused on this problem; in this sense, it is clear Dicey's Rule of Law solution was provided with a particular agenda in mind. (I will return to this point in a moment.) The importance of reading Dicey in context, and in relation to the changes in society over time, is not new. A compelling case for doing so was made by F.H. Lawson in 1959.²⁰ In the same year, Lawson's comment was referred to by E.C.S. Wade in the preface to the 10th edition of Dicey's work.²¹ However, when context is taken into account, it becomes readily apparent that Dicey's perceived problem is *different* to any present-day problem. The 19th century

¹⁹ ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 175, 180 and 182 (3 ed. 1889).

²⁰ F.H. Lawson, *Dicey Revisited. I*, 7 POLIT. STUD. 109-126 (1959); F. H. Lawson, *Dicey Revisited. II*, 7 POLIT. STUD. 207-221 (1959).

²¹ A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION x (10 ed. 1979).

expansion of the state and its apparatus that provided the motivation for Dicey's fear, and resulted in his perceived Rule of Law problem, seems quaint when compared to the scope of the administrative regime that is embodied by modern western democratic states that profess adherence to the Rule of Law. For Dicey, the present situation would be anathema to the existence of the Rule of Law. The attempt to return to a situation that would reflect and embody a Diceyan Rule of Law state would now, in the face of the modern administrative state, be impossible.

It is possible to look to an even more recent example to illustrate that—in situations where a Rule of Law idea is proffered with a particular agenda in mind—the context of an idea's formulation is crucial in the understanding, and potential re-application, of that idea. Like Dicey, Hayek—writing in 1944—provides a popular and widely cited account of the Rule of Law. And, like Dicey, that account was focused on pressing a particular agenda. The use, citation, and application of both accounts can be seen as a paradigmatic instance of the way in which the Rule of Law's usual suspects are deployed.²² Hayek's account differs to Dicey's as it can be seen at its core as an attack on socialism. State coercion is, for Hayek, a fundamental issue that can be

²² Dicey and Hayek can, together, be seen as providing a backbone for the way in which the international Rule of Law is derived. See, Burgess, *supra* note 18.

tempered only by the actions of a limited government being predictable.

Nationalisation and state control of resources in the United Kingdom during World War II also give rise to a fear in Hayek that those measures may continue after the war.²³ For Hayek, this problem could be solved by constraining the government's actions and by allowing an individual to plan around state action and, therefore, avoid coercion. In this respect, and whilst Hayek sees himself as engaged in a different project to Dicey,²⁴ both thinkers' projects reflect their fears of the rise of the social welfare state and the decline of the Rule of Law in the United Kingdom.

I do not suggest the early 21st century is devoid of problems associated with the fear of totalitarian or arbitrary rule or the coercion of the populous through the imposition of unknowable sanctions. But, in circumstances where Dicey and Hayek's fears relate to problems of a fundamentally different nature and character than those which exist today, their solutions must be viewed in a way that acknowledges and recognises that difference. Given this fundamental difference between socio-political

²³ FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 11 (Bruce Caldwell ed., 2007).

²⁴ In a footnote to his oft cited definition of the Rule of Law, Hayek suggests '[l]argely as a result of Dicey's work the term [the Rule of Law] has, however, in England acquired a narrower technical meaning which does not concern us here.' *Id.* at 112.

environments in which Rule of Law conceptions may have been authored and those in which they are applied in modern society, an increased awareness of conceptions' origins is necessary to avoid the loss of solutions to *future*–Rule of Law-relevant–problems.

I commenced this part with a brief allusion to a tool-based analogy. Let us deepen this a little further. Around the world, there are many butter knives that have been press-ganged into service as pseudo flat-head screwdrivers; and there are many flat-head screwdrivers that have been used to open–and sometimes stir–tins of paint (which may explain why the knife was needed for the screw in the first place!) I am not suggesting that the use of these things is *wrong*; after all, each innovative re-application clearly served a present need. The re-application of a tool in this new way can often achieve, precisely, the desired effect. In this sense, the innovation could even be construed as a good thing. But, what happens when the *original* purpose is lost or forgotten? What happens when the knife (as a screwdriver) is not returned to the cutlery drawer and, instead, is placed in our (actual) toolbox? Is the tin-opening, and now paint-covered, screwdriver still able to be used effectively as a screwdriver? It seems conceivable that, despite the tools' original purpose–the purpose for which they were originally made before being innovatively re-purposed–can be obscured by the new function. This is

certainly not a problem in some respects. After all, even if the screwdriver's function is lost or forgotten, a *new* tool—in the shape of our knife (as a screwdriver)—now exists to tackle any similar screwdriving jobs that may arise in the future. But, if the original purpose—and the connection between that purpose and the original problem that it was designed to solve—is forgotten, then *something* is lost: the original solution to the original problem as addressed by *that* tool. One argument against this could be that this isn't really a problem if *another* tool can provide an adequate solution to the original problem. After all, in our example, the knife replaces the lost function of the flat-head screwdriver and is able to solve the immediate problem that arose. Yet, whilst there are undoubtedly situations in which a knife *can* provide an almost identical solution and act as a replacement, there are circumstances where a knife simply cannot achieve the same result as a screwdriver. Think, for example, of a situation where the screw is recessed. Should a problem of this kind arise in the future, then, as the function of the screwdriver (as a screwdriver) has been lost, we are left without a solution. (Or, in the least, we are required to innovate from scratch to come up with a *new* solution.) This may not be—at the time of the initial re-application / innovation that repurposes the butter knife and abandons the screwdriver—immediately apparent. It may be some time before the need that cannot be satisfied by the new tool—but could have been satisfied by the old tool—arises.

My point is that, at the moment when the old tool is abandoned, any potentially unique problem-solving utility that it may have had is also lost. This loss is important. Our choice of problem solving solutions in the future is restricted by virtue of alternative solutions being lost or driven out.²⁵ It is only by *actively* considering the purpose for which a tool exists and the purpose for which it was originally employed and deposited in the toolbox that we can hope to maintain and understand the tool's application in the past and in the present as well as in the future. Doing otherwise deprives us of potentially useful solutions. (I will return to this point later.)

This somewhat extended analogy illustrates two things. First, innovating in the use of our toolkit is not a bad thing; in fact, it can lead to solutions that would not, otherwise, have been contemplated had the tools been used solely for the purpose for which they were originally created. Innovation may, in fact, become essential should the original tool not work in the same way (for example, if the underlying problem changes). Further, innovating in a way that does not distort the originally posited ideas provides a way to maximise our potential—by not curtailing available options—to deal with new problems. Second, understanding the history of our conceptual toolbox is essential to ensuring that we do not lose solutions that may

²⁵ For a similar sentiment, see Krygier, *supra* note 16 at 330.

otherwise have proven useful in relation to our current and future problems.

Of course, these things are not mutually exclusive. Both could be achieved at the same time. In bringing the analogy back to the topic at hand, it is relevant, then, to ask at least two questions: Are both being achieved in relation to the concept of the Rule of Law? And, does the inclusion of a history or back-story at the start of so many papers satisfy this requirement? I think that the answer to both questions is, currently, 'no'. Whilst innovation in the application and use of the concept of the Rule of Law is undoubtedly taking place, there seems to be an under-appreciation of the purpose, meaning, and relevance of the Rule of Law ideas posited in the past. Putting this another—more positive—way, there is considerable scope for research to be conducted into the original meaning of the Rule of Law solutions that are so frequently alluded to when the concept is being considered. But, a key question then arises: is undertaking this research-challenge practical?

I do not suggest that the origins of every Rule of Law conception must be chased down every rabbit hole in every inquiry. Attempting to do so would, of course, be impractical. However, my suggestion that there should be an increased focus on the history and origins of Rule of Law conceptions more generally *is* practical; or, at least, it is achievable practically. It is this idea that informs my thesis in general terms. There is a burgeoning interest in

the connections between theory and history in the law. Recent work suggests there are distinct advantages that may result from a dialogue between the two sub-disciplines (of legal theory and legal history),²⁶ or in the critical re-evaluation of the law as the product of a historical evolution.²⁷ A more Rule of Law-specific version of this general trend would benefit greatly the academic pursuits associated with the concept of the Rule of Law. The exploration, in a more rigorously historical sense, of the various frequently cited Rule of Law positions' origins would ensure that the original meanings of those concepts could, if lost, be rediscovered or, if known, be more deeply appreciated. Establishing that this is both possible and desirable—not to mention, interesting—is a fundamental goal of my work.

Whilst an increased focus on the history and origins of Rule of Law conceptions may be worthwhile, I do not suggest that this is a project that can be *easily* realised or located within a single field of study. History is, of itself, a massive, complicated, and technical discipline. Most of the Rule of Law usual

²⁶ MAKSYMILIAN DEL MAR & MICHAEL LOBBAN, *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* (2016). For my assessment of this work's importance, see Paul Burgess, *Review: Law in Theory and History: New Essays on a Neglected Dialogue*. Ed by Maksymilian Del Mar and Michael Lobban, 21 *EDINB. LAW REV.* 305–307 (2017).

²⁷ BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017).

suspects referred to above, by virtue of being members of the 'Who's Who?' of Western political thought,²⁸ have already been the subject of an entire industry of academic production across a variety of disciplines. No single work could supersede this. However, as the works cited immediately above illustrate, there is scope for a Rule of Law-relevant dialogue to be expanded upon. In this sense, there can be benefits afforded even through appreciating and applying the range of basic forms of historical inquiry that are available (even to non-formally trained historians). Of course, as the Rule of Law is a concept that has often extended across arbitrarily imposed disciplinary boundaries, this should be no great surprise. But it also serves to illustrate that, whilst I have remained based in a law school whilst writing this thesis, cross- or inter-disciplinary exploration of the topic is both possible and, dare I say, interesting.

On this basis alone, the argument that I pursue in this thesis seems worthwhile. Whilst, for example, aspects of archival research may prove both unattractive and impractical for some, other ways of 'doing' history may be more familiar to the (non-historian) lawyer's skill set. Various approaches to textual analysis or conceptual and intellectual history may provide sufficiently

²⁸ See, MØLLER AND SKAANING, *supra* note 7.

robust yet practically achievable methodologies to facilitate a project of the sort imagined (for a non-historian). Taking this sort of approach—or any approach that affords a level of heightened historical appreciation of the ideas associated with the concept of the Rule of Law—even at the level of an individual paper, provides a way to ensure that the solutions initially proposed are not forgotten, and that subsequent innovative uses do not ultimately prevent the reapplication of original uses in the future. The two ‘case studies’ in this thesis—relating to Hobbes’s *Leviathan* (in Chapter 4), and Locke’s *Two Treatises of Government* (in Chapter 5)—together with the analysis, assessment, and extension of the ideas (in Chapter 6) illustrate how thinking about the Rule of Law in greater historical depth across only two different historical periods can clearly and, relatively, easily illuminate, enhance, and extend our understanding of both the historical and the contemporary idea of the Rule of Law.²⁹

In returning briefly to the analogy introduced above, the ultimate result of this increased focus will be to afford clarity as to why a particular tool is included within the toolbox; or, in other words, the meaning and intention behind the tool’s inclusion will be illuminated. What’s more, it seems conceivable that an increased focus on the history of Rule of Law conceptions

²⁹ I return to this point in Chapter 7.

will not only illuminate what *is* in the toolbox, but it may also illuminate what *is not* presently accepted as being in the box (but perhaps was intended to be included by original thinkers). After all, there are—even with widely cited conceptions of the Rule of Law—aspects of a thinker’s original idea that are often neglected in contemporary application; for example, Dicey’s third principle—that judicial decisions are to be privileged (as general principles of the constitution result from those decisions)—is often neglected when Dicey’s conception is applied more generally.

In considering the colouring of our way of thinking about the Rule of Law—as a result of the current, state-centric, paradigm introduced at the start of this part—it seems there could be ideas—associated with the earlier, pre-state-centric, paradigms—that have been practically forgotten (insofar as their application in a Rule of Law-sense) that could, nevertheless, prove useful when applied to contemporary problems. For example, ideas that may have been neglected as a result of their relative unnecessaryness or unimportance in a state-centric paradigm could have particular relevance to the contemporary application of the concept in a similarly non-state-based sphere (for example, in international law). By considering—or reconsidering—the Rule of Law in this way, the start of a relationship—or, more specifically, an inter-relationship—between the usual suspects’ conceptions begins to form.

PATHS (HISTORICALLY) TAKEN, AND THOSE NOT TAKEN

The phrase '*it is what it is*', could easily—although, perhaps, not very helpfully—be applied to current approaches to the concept of the Rule of Law; however, the same cannot really be said for the slightly modified phrase '*it is what it was*'. Merely understanding the origin of the Rule of Law with respect to the differences between a *single* point in the past, and another single point—perhaps the present—seems, somewhat, unsatisfactory if the Rule of Law is viewed, as it is by many, as a continuing tradition.³⁰ A lot can happen between *then* and *now*. As noted earlier, ideas about the Rule of Law have changed as various aspects have fallen into and out of favour. Furthermore, at each intervening point, any new thinker has the potential to innovate in relation to the meaning of the concept of the Rule of Law for *that* thinker at *that* time through the application of and in relation to the Rule of Law conceptual toolkit that is available to him or her at *that* time. (Here, and for the purpose of this discussion, I sidestep the—admittedly difficult—issue relating to establishing the nature and extent of influence of one thinker's

³⁰ Martin Krygier, *Law as Tradition*, 5 LAW PHILOS. 237 (1986); Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEORGET. J. LAW PUBLIC POLICY (2014).

work over another's.³¹) This would mean that at any stage, and for any thinker, meanings of previous ideas could be either retained, changed, or lost. This could be compounded as, say, an early thinker's ideas are re-interpreted by a subsequent thinker and these re-interpretations are themselves re-interpreted by a later thinker. At each stage, the same options to retain, change, or lose the earlier meaning exists. As each of the subsequent thinkers could be acting in response to a new or different problem, and/or be acting with his/her own agenda, this renders the task of plotting the overall history of the Rule of Law substantial (to say the least).

Further, should there be some form of continual re-invention of the conceptual toolkit through time, path dependency will impact the eventual outcomes.³² The existence of a prior conceptual toolkit, and the consideration of change across ideas of the Rule of Law through history, may enable a determination to be made as to whether path dependent processes have

³¹ See, for example, Quentin Skinner, *The Limits of Historical Explanations*, 41 PHILOSOPHY 199-215 (1966). For a convincing exposition of the benefits of the idea, see FRANCIS OAKLEY, *POLITICS AND ETERNITY: STUDIES IN THE HISTORY OF MEDIEVAL AND EARLY-MODERN POLITICAL THOUGHT* Chapter 5 "Anxieties of Influence:" (1999).

³² For a similar consideration of ideas of this sort, Jørgen Møller, *Medieval Origins of the Rule of Law: The Gregorian Reforms as Critical Juncture?*, 9 HAGUE J. RULE LAW 265-282 (2017).

operated over time.³³ One way of seeing and understanding path dependency is in these terms: 'A *path-dependent* sequence of [...] changes is one of which important influences upon the eventual outcome can be exerted by temporally remote events, including happenings dominated by chance elements rather than systematic forces.'³⁴ For the sake of clarity, and as it has been used in previous Rule of Law relevant analyses,³⁵ it is also relevant to mention Douglass North's definition of the same idea. North's idea is not—in the context of this chapter—incompatible with the definition outlined above. North views path dependence in terms of 'the constraints on the choice set in the present that are derived from historical experiences of the past'.³⁶ Both of

³³ In relation to the ideas of path dependence generally, see Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332-337 (1985); Graham Ferris, *The Path-dependent Problem of Exporting the Rule of Law*, 101 ROUND TABLE 363-374 (2012); Scott E. Page, *Path Dependence*, 1 Q. J. POLIT. SCI. 87-115 (2006).

³⁴ David, *supra* note 33 at 332. See also Jonathan Rose, *Studying the Past: the Nature and Development of Legal History as an Academic Discipline*, 31 J. LEG. HIST. 101-128 (2010). In particular, see note 7, at page 103: 'The basic notion is that where you start determines where you end up and that you may have ended up somewhere else had you started at a different place.'

³⁵ Ferris, *supra* note 33.

³⁶ See, for example, DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 52 (1999). The Northian analysis is explored and applied in Ferris, *supra* note 33. See also, consideration of North's ideas in terms of Law and Development

these views reflect the sense that decisions in the past can be considered as influencing not only presently available choices, but also the outcomes that may ultimately be available in the future as each choice that is made by an innovating Rule of Law thinker has the potential to impact the nature of the choices available to the 'next' thinker; and it is this 'next' or future thinker that applies the Rule of Law concept—now, potentially, slightly modified as a result of the retention, change, or loss of options that were available to the earlier thinker—that is available to him or her. And so, the process goes on.

Yet, these intricacies are lost—as, potentially, are various specific aspects of conceptions that may have been rejected along the way—if a simple 'then' and 'now' approach is taken to previous Rule of Law ideas. To fully appreciate the complexities of the concept of the Rule of Law—and even to fully justify the correct use of the statement '*it is what it is*'—it is necessary to explore and understand that '*it is (also) what it was*'; which, when considered in more path dependent terms, may more accurately be stated as '*it is (also) what it is as a result of what it was*'.³⁷ Through engaging with the historical ideas that underpin the origins and intent behind each of the usual suspects'

in Julio Faundez, *Douglass North's Theory of Institutions: Lessons for Law and Development*, 8 HAGUE J. RULE LAW 373–419 (2016).

³⁷ I am grateful to Martin Krygier for raising this point.

Rule of Law accounts—and by more accurately understanding what they were by considering, as I do in this thesis, the question of whether canonical ideas of the Rule of Law can be seen as being engaged in a form of conceptual evolution or revolution—this process can, at least, be started.³⁸

THESIS STRUCTURE

My thesis represents a modest step in increasing the focus on the history—and understanding the historical origins—of ideas that can be included under the broad banner of the concept of the Rule of Law. In examining canonical Rule of Law accounts from Hobbes and Locke—two of the canonical authors of the Rule of Law literature—my aim is to examine the way in which two Rule of Law accounts that are closely related in time (the mid and mid-late 17th century,) and culture (English political society,) can be seen as being similar or dissimilar in terms of the accounts' subsumption under the conceptual umbrella of the Rule of Law. However, before any consideration of those thinkers can take place, it is necessary to do two things: first, to consider, in more detail, the way in which ideas of the Rule of

³⁸ From early origins, social scientists and theorists—for example, Marx, Durkheim, and Weber—have considered the operation of time in relation to their ideas. My approach to evolutionary and revolutionary ideas is, as will become apparent, somewhat different.

Law are presently used, deployed, and examined; and, second, to define in more precise terms what I will consider the Rule of Law to be for the purpose of this thesis. I do this in the second and third chapters, respectively.

In Chapter 2, I identify four tropes of the Rule of Law literature—as four common assumptions that can be identified at the start of the vast majority of papers that consider the meaning and application of the concept of the Rule of Law—in order to illustrate that whilst the assumptions are accepted as part of the conceptual narrative of the concept, the assumptions' cogency falters when they are considered collectively. I argue that consideration of collective cogency is necessary for conceptual clarity. To illustrate the essentiality of doing so, I stipulate two hypothetical and extreme forms of conceptual change—*evolutionary* and *revolutionary*³⁹—and illustrate that, when the assumptions are considered in terms of these forms of change, the nature of the inconsistency varies considerably. This approach illustrates not only the general inconsistency, but also that inconsistency varies *between* the mechanisms. This variance leads to a fundamental problem: without the

³⁹ I define these in Chapter 2. Here, it suffices to note that for evolutionary change, subsequent ideas are necessarily reliant on earlier ideas; if change is not evolutionary, it is revolutionary. I return to, and reapply, these forms of change when considering the change that has occurred between Hobbes's and Locke's Rule of Law-like ideas in the final chapter.

identification of the change mechanism that has operated across Rule of Law related ideas, there is no way to assess whether the Rule of Law's common assumptions are, or can be, consistent with one another. I also suggest one way to solve this problem: the use of a problem / solution based contextual examination of Rule of Law accounts. This methodology is adopted—in the assessment of Hobbes and Locke—in Chapters 4 and 5.

The appreciation of the Hobbes and Locke case studies and, more specifically, the necessary identification of Rule of Law-relevant problems with which to pair the two thinkers' Rule of Law-relevant solutions requires a clear understanding of what the Rule of Law *is*. However, in circumstances where the very meaning of the Rule of Law is contested, and most popular ideas of the Rule of Law are derived from contemporary understandings of the concept, using a present-focused idea to identify the existence of a historical idea of the Rule of Law risks putting the conceptual cart before the conceptions' horse. In other words, if a methodology like the one I adopt is *not* adopted, the danger would be that an argument could simply read into the historical accounts what we already know; in terms of the analogy explored in this chapter, by using the contemporary idea of the Rule of Law we would risk forgetting that the concept (as a tool) may have had a prior and

more specific use that may otherwise have been forgotten.⁴⁰ In order to avoid this, an idea of the Rule of Law that is not solely derived from the contemporary conceptual view is necessary. I develop this view in Chapter 3.

I do not claim that the methodology I adopt is the *only* way to approach the issue of how to historically interrogate the Rule of Law. Doing so would require a far broader undertaking; although its achievement—by, perhaps, conducting a detailed study of each moment in history relevant to Rule of Law ideas—affords an interesting way to consider the potential path dependant nature of the concept.⁴¹ I frequently describe my methodology as being a modified approach derived from Quentin Skinner’s broad contextualist methodology and the logic of question and answers advocated by R.G. Collingwood.⁴² However, after settling on the approach that I would take, I became aware of a parallel idea that closely mirrors the hybrid methodology that I have adopted. This broadly similar idea—that of serial

⁴⁰ I am not the first to relate the Rule of Law to the idea of a tool. See, for example, RAZ, *supra* note 2. For an expansion of this point, see Chapter 3.

⁴¹ I expand on this point in Chapter 7.

⁴² For the classic statements of these points, see Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. THEORY 3–53 (1969); ROBIN GEORGE COLLINGWOOD, AN AUTOBIOGRAPHY (1939).

contextualism as a *history in ideas*—has recently been advocated by David Armitage.⁴³ Armitage describes the idea in this way:

The outcome of an openly admitted and consistently pursued serial contextualism would be what I have called a *history in ideas*. I take this to be a genre of intellectual history in which episodes of contestation over meaning form the stepping-stones in a transtemporal narrative constructed over a span of time extending over decades, if not centuries.⁴⁴

Armitage, as a former student of Skinner, adopts an approach that—whilst it may not be described as being ‘Skinnerian’—could certainly fall within the Cambridge School of intellectual history that Skinner helped to create.

The parallel with my approach can most closely be seen in Armitage’s examination of the concept of civil war across history. He explores several periods in order to identify the meaning—and the difference in meaning—attributed to the concept of ‘civil war’ in various historical periods. There is also commonality in our approaches as Armitage adopts a long historical

⁴³ David Armitage, *What’s the Big Idea? Intellectual History and the Longue Durée*, 38 HIST. EUR. IDEAS 493–507 (2012). See also the application of this idea to a similarly debated and ancient concept—that of civil war—in DAVID ARMITAGE, *CIVIL WARS: A HISTORY IN IDEAS* (2017).

⁴⁴ Armitage, *supra* note 43 at 499.

period under his methodology. It is this point at which Armitage, and I, depart from the Cambridge School's more detailed historical examination within a particular very narrow window of time.⁴⁵ Whilst providing a parallel, the temporal scope of focus also forms a crucial point of differentiation between Armitage's approach and mine. Armitage seeks to compare the meaning of the concept of civil war from antiquity to the present day. Whilst I see a similar extended temporal scope as being a worthwhile endeavour in relation to the concept of the Rule of Law overall,⁴⁶ this extremely *longue durée* approach is not one that I advocate in this thesis (for purely practical reasons). In this respect, whilst my methodology derives from Skinner and Collingwood, and even though it closely resembles Armitage's serial contextualist approach, it most accurately lies somewhere in between the two.

Accordingly, the problem / solution approach (as I refer to it throughout this thesis) that I adopt represents a novel methodology that is applied in an original way to the concept of the Rule of Law. The problem / solution methodology's application to the question of historical changes in the concept of the Rule of Law does provide a way—and a theoretically robust

⁴⁵ For a broader statement of Armitage's purpose in this respect, see JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* (2014).

⁴⁶ I expand on my ambitions in relation to this point in Chapter 7.

and beneficial way—to assist in our understanding of the concept of the Rule of Law more generally and contemporaneously.

In Chapter 3, taking a broad survey of all canonical Rule of Law thinkers, and by attempting to identify the ‘need behind the need’ that exists in each of the usual suspect’s conceptions, I attempt to identify an agreed and agreeable Rule of Law idea that exists beyond the contested sphere of the Rule of Law literature. In other words, because the contested nature of the concept renders the use of a single theorist’s conception or, alternatively, the adoption of a hybrid conception open to criticism, there is no settled and practical way to identify what could broadly be conceived as a Rule of Law-like idea. Accordingly, I argue in Chapter 3 that the fundamental needs undergirding canonical conceptions can be used to identify common elements of the Rule of Law. By taking this approach, I distil two necessary Rule of Law elements: Comprehension; and, Procedural Pellucidity. As a result of their elemental nature, an inability to comply with the elements reflects a total inability to be conceived as a Rule of Law-like idea regardless of the canonical conception preferred.

Across the thesis more broadly, I use the two Rule of Law elements—together with a slightly more abstract idea of the Rule of Law as a normative force—in order to frame a working definition for the concept of the Rule of

Law. I provide more details about the rationale for doing so and the basis on which the ideas are formed in Chapter 3. However, it is useful to note at this stage that the reason for the distillation of an idea of the Rule of Law that can be seen to exist beyond the relative levels of contest regarding the concept is to avoid pre-determining the outcome of my wider thesis (by adopting a presentist idea of the Rule of Law.) I use the elements and the normative force idea of the Rule of Law as ways to identify aspects of Hobbes's and Locke's ideas (in Chapters 4 and 5) that could be considered as being encompassed by my working definition. In other words, I use the working definition to identify Rule of Law-relevant aspects of both the solutions—that are the subject of both Hobbes's and Locke's canonical Rule of Law works—and the Rule of Law-like problems that I argue, in Chapters 4 and 5, can illuminate and disambiguate those Rule of Law-like solutions.

The Hobbes and Locke case studies (Chapter 4 and Chapter 5, respectively) can be discussed together. The problem / solution methodology is used to shed extra light on both thinkers' ideas. By contextualising each thinker in relation to his environmental, relational, and authorial context, I illustrate that the Rule of Law problem that is commonly taken to be the target of each of the thinkers' Rule of Law solutions—in *Leviathan* and the *Two Treatises*—is inaccurate due to the fact that a number of

other Rule of Law-relevant problems exist to which the accounts could be seen to relate. (In terms of my tool analogy, these problems have been forgotten in the Rule of Law debate.) I treat the thinkers' accounts in these two works as a solution to problems in society that were perceivable by each author and that can be identified through an exploration of the pamphlets that were most popular during the period that each author was writing. In these chapters, I largely limit myself to the application of the problem / solution methodology and to exploring and illuminating the various facets of the thinkers' Rule of Law accounts.

In Chapter 6, I bring together the Hobbes and Locke case studies and explore similarities and differences in their accounts. I explain how the application of the problem / solution methodology facilitates the clarification of Hobbes's and Locke's conceptions of the Rule of Law, and how it brings clarity to the content of the concept of the Rule of Law more generally. By considering similarities and differences that can be seen at varying levels of analytical scrutiny in *Leviathan* and the *Two Treatises*, I argue that the accounts, whilst both being conceived in terms of the broad umbrella of the Rule of Law, have almost no true similarity. This absence of similarity is not simply based on the fact that the two accounts are, on the face of it, very different accounts. By considering their Rule of Law accounts as being

solutions to perceivable societal problems, I, first, identify similarities that could be seen to exist in the accounts. Second, I illustrate why those superficial similarities cannot be seen as *true* similarities: the solutions—even if couched in similar terms—respond to different problems; and, different inflections in the solutions reflect different meanings. This renders them distinguishable from one another. I then illustrate that the differences that are identifiable in the problems that are posed are also different in *nature* to the differences that exist in relation to the broadest caricatures that are often associated with both thinkers' work. By taking this approach, I illustrate that considering the accounts in terms of a problem / solution relationship disambiguates any similarities and differences that are, otherwise, confused.

Chapter 7 provides a very brief conclusion. (In this sense, it could have been described as 'concluding remarks' in preference to 'chapter'.) In addition to addressing the issues raised in this chapter, I consider both the—evolutionary or revolutionary—change between Hobbes's and Locke's conceptions of the Rule of Law and answer my research question. I also consider the impact that my conclusion and analysis more generally will have on our contemporary conceptions—as well as our meaning, understanding, and application—of the Rule of Law.

(UNINTENDED) CONCEPTUAL EUGENICS

In concluding this introductory chapter, I return—one last time—to the toolbox analogy. As noted above, the use and innovative re-use of tools that we currently have in the toolbox for the solution of problems that we currently have is all well and good, but we are potentially missing something if we fail to consider both the intention behind the tools' current inclusion in the box and, relatedly, the reasons why other tools are not (or are no longer) in the box. In the same way, increasing our focus on the origins of ideas associated with the Rule of Law will not only illuminate the rationale for and behind the contemporary operation of the concept, but it will also illustrate aspects of the concept or conceptions that are no longer included. In returning to the example given above, this could—in the simplest sense—result in the relative unshackling of Rule of Law ideas from the state-centric system in which the contemporary concept cannot—otherwise—be disentangled. Consideration of the original or earlier intentions and motivations that generated ideas we now accept as part of the dominant Rule of Law paradigm may, in this sense, prove to be both useful and, in some respects, essential in avoiding future dire conceptual consequences.

What dire consequences? One relates to the sub-title of this chapter: *(Unintended) Conceptual Eugenics*. If it is the case that there is some form of

path dependent operation to the Rule of Law—meaning that our present choices are derived from, and to some degree influenced by, experiences of the past—then we neglect origins at our peril. Should we fail to take account of the origins of the concept—by continuing to simply innovate around the idea that we presently have, by overlooking both the meaning and context behind the current concept, and by forgetting those ideas that we no longer see—then future development of the Rule of Law will be impoverished and will, potentially and perversely, not be faithful to the ideas from which it is ultimately derived. To be clear, I am not suggesting we must simply accept the earlier accounts as they were written. Instead, we must understand the accounts in order to ensure that any acceptance, change, or modification—by way of the contemporary application of those older ideas—does not unintentionally impoverish the options available to us or to future thinkers: in re-purposing the butter-knife, we must not forget the screwdriver. Doing so—and in taking steps to better understand the origins of Rule of Law ideas—will better enable us to innovate in ways that allow responses to both current *and* future problems. In other words, whilst we are free to consider, accept, and reject various aspects of earlier thought, our intellectual obligation is to not distort or misrepresent those earlier ideas.⁴⁷ By failing to appreciate its origins

⁴⁷ I am grateful to Brian Tamanaha for stressing the importance of this clarification.

today, we risk the (unintentional) imposition of a selective approach—a too selective approach, perhaps—in the interpretation and application of the concept in the future.

Today's failure to take account of the past restricts the potential options available to us in the future. This process may not be the result of a conscious choice; the selections that we have available in respect of future solutions may—as a result of our current neglect—become increasingly restricted as a result of the simple acceptance of the dominant paradigm and our failure to examine the concept's origins. In effect, the consequence of our neglect is the unintentional pre-selection—or limitation—of the potential future Rule of Law solutions that will be available. In putting this another way: origins matter. This thesis is an attempt to both illustrate that this is the case and to suggest one way in which this dire process of (unintentional) conceptual eugenics can be avoided.

CHAPTER 2:

THE RULE OF LAW IN THE RULE OF LAW:

PUTTING THE PROBLEM OF THE RULE OF LAW IN CONTEXT

INTRODUCTION

There is a substantial problem in the Rule of Law literature: without the clear identification of the actual change mechanism that has operated across Rule of Law related ideas—something that we do not yet have—there is no way to assess whether various common assumptions in the Rule of Law literature are, or can be, consistent with one another. In this chapter, in order to illustrate the motivation for the thesis more generally, I identify a number of commonly accepted assumptions that form a common and recurring contemporary narrative in the Rule of Law literature: the Rule of Law is over 2000 years old; there have been a number of canonical Rule of Law ideas; contemporary ideas of the Rule of Law differ to earlier Rule of Law ideas; and, the Rule of Law is a highly, or essentially, contested concept. I describe them as assumptions as they are generally cited as forming part of the conceptual backstory of the Rule of Law; they represent foundational, generally unexamined, beliefs about the Rule of Law on which more substantive

arguments are based. The assumptions derive from both primary works that could be seen to form a canon of work associated with the concept—the usual suspects introduced in the previous chapter that include: Aristotle; Hobbes; Locke; Dicey; Hayek; and, Fuller—and from a secondary literature that analyses that canon. Within this body of work the assumptions' collective cogency has not previously been considered. Yet, as further ideas are based on the assumptions—and where the assumptions are often provided with a view to establishing a shared understanding about the concept—I argue that consideration of this collective cogency is necessary for conceptual clarity.

This chapter provides a fundamental statement of the motivation behind the thesis and functions as an overview of the literature that forms the debate regarding the conceptual content of the Rule of Law. In illustrating the basic problem—that without the clear identification of the actual change mechanism that has operated across Rule of Law related ideas, there is no way to assess whether various common assumptions in the Rule of Law literature are, or can be, consistent with one another—and through illustrating the basic form of one way to solve the problem, the rationale behind (and structure of) the remaining chapters becomes clear. In short, I illustrate that a problem exists to which my thesis provides—at least one aspect or small part of—the solution.

I expose the potential for inconsistency when the assumptions are considered together by exploring the assumptions' cogency in terms of two hypothetical mechanisms of change. The result is not only the identification of inconsistency generally, but also the finding that the inconsistency varies between the mechanisms. This fundamental problem of inconsistency across the works that represent the 'go-to' authors in the Rule of Law debate represents a substantial problem. It is this variance that leads to the problem identified in this chapter's first sentence. Further, it is because of the existence of this problem that my thesis's wider argument has both value and structure. It has value as I provide one possible solution to this problem and approach: I suggest a contextual assessment of Rule of Law accounts as being one way that the problem can be solved. In circumstances where the concept is so often cited, referred to, and deployed in academic argument, yet where potentially inconsistent assumptions play a foundational role, enhanced clarity is undoubtedly both necessary and long overdue. My thesis is also structured by this argument as, in adopting the solution that is advocated, I go on, in the fourth and fifth chapters, to illustrate the application of the methodology before, in the final two chapters, explaining how the assessment benefits and addresses the problem identified here.

In this chapter, I cite a number of sources that identify, and rely on, various common assumptions in relation to the analysis of the Rule of Law. These citations can generally be found in the opening paragraphs (or opening sentences) of the works cited. This is, as will become apparent, a clear and recurrent theme. The authors offer their statements to describe what the Rule of Law *is* and, relatedly, as an account of where the concept's origins lie. The foundational importance of this analytic approach is apparent from Martin Krygier's observation: 'It is common to start discussions of the rule of law by saying *what* it is before going on to ask what, if anything, it might be good for and worth...' ¹ In establishing an agreed, and agreeable, foundation for what the Rule of Law *is*, the assumptions—whilst relating to different characterisations of the concept—provide a shared understanding about the concept on which further arguments about the meaning or operation of the concept can be based. In this respect, the assumptions do a lot of—largely hidden—work. The assumptions each offer a relatively weak notion of what the Rule of Law is but, through their collective cogency, they purport to provide a strong base on which to structure a Rule of Law argument. The way in which these ideas come—or are brought—together

¹ Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, in *GETTING TO THE RULE OF LAW* 64–104, 65 (James Flemming ed., 2011).

reflects a consilience of inductions: where 'an Induction, obtained from one class of facts, coincides with an Induction, obtained from another different class. This Consilience is a test of the truth of the Theory in which it occurs'.² In other words, if two (or more) independent notions lead to the same conclusion, this provides support for the wider theory; ideas, by their consilience, reinforce one another. The assumptions I identify reflect different—historical, analytical, or ontological—characteristics of the concept of the Rule of Law. To provide consistent support for the wider theory of the Rule of Law, the assumptions—when viewed as independent notions—would be expected to support the same conclusion. However, as I will illustrate, the assumptions do not and cannot come together as various inconsistencies result in their—ultimate—failure to provide a base on which to structure more substantive ideas.

Notwithstanding their foundational importance, the assumptions do not, in this respect, represent positions of considered argument. In effect, the statements reflect the commonly endorsed positions in relation to the concept of the Rule of Law in the Rule of Law literature; their existence or

² WILLIAM WHEWELL, 2 THE PHILOSOPHY OF THE INDUCTIVE SCIENCES, FOUNDED UPON THEIR HISTORY 469 (New ed. 1848). See also, EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 8–9 (Reprint edition ed. 1999).

correctness is simply assumed. The common assumptions are *assumptions* not only because they play a crucial foundational role on which further arguments are structured, but also because they are often treated—in those arguments—as unspoken aspects of the argument; there is frequently no argument—other than mere citation of canonical works—offered in support of the various statements. Of course, we must, to some degree, rely on works that have come before us; it would be impractical to suggest—and I do not intend to do so—that in every mention of, for example, Aristotle, a complete exegesis of his works should be undertaken. I highlight this issue only to illustrate that the common assumptions are used as background information and as a way of setting the scene for the discussion to come. By highlighting the assumptions' incompatibility—where our reliance on robust and consistent assumptions is advantageous—I expose the nature and scope of a problem inherent in the literature: that without the identifying the way in which Rule of Law ideas have changed, there is no way to assess whether the common assumptions in the Rule of Law literature are, or can be, consistent with one another. It is on this fundamental problem that I have focused my thesis: the aim is to illustrate, and consider, the change mechanism that has operated between two of the canons of the Rule of Law literature.

The problem can be seen when the assumptions are considered in terms of potential mechanisms of change. If it is accepted that there has been some form of change in relation to the idea of the Rule of Law—a position that must be accepted if the various works that form the Rule of Law literature relate to the same overarching family of ideas—the mechanism of change can impact the extent of any inconsistency across the common assumptions. To demonstrate this, I stipulate two hypothetical and extreme forms of conceptual change: *evolutionary* and *revolutionary* change. I then illustrate that, when the assumptions are considered in terms of these forms of change, the nature of the inconsistency varies considerably. In short, I demonstrate that the operation of either of the change mechanisms impacts the nature, extent, and frequency of the inconsistencies in the assumptions. By exploring these two (crude) ways of conceiving a macro- process of change, I expose the potential for substantial inconsistencies across the assumptions and suggest that, if clarity is important, it is, therefore, necessary to identify the change mechanism that has operated.

The solution to the problem is, simply stated, to identify the mechanism of change. One way to do this is to identify precisely what (a particular conception of) the Rule of Law is (or, more properly, was) at the point at which the idea was stated. A closer examination of canonical Rule of

Law ideas, in the context of their creation, will more clearly illustrate exactly what the Rule of Law was (for each canonical author) at that time and, thus, when compared to any subsequent canonical conception, the mechanism of change can be identified. Change can only be considered—and, hence, the problem identified in this chapter be answered—once this has happened. I introduce this idea as a solution to the problem—and as a methodology for the remainder of the thesis—at the end of this chapter. Before we can begin to explore the problem in the Rule of Law literature, however, some conceptual ground-clearing is required.

The Rule of Law spans a number of disciplines and is viewed in a discreet conceptual form within each. Further, it seems likely each individual in Rule of Law relevant fields may have his or her particular idea of what the Rule of Law is. So, to narrow the scope of this chapter, I only explore the body of work that looks to identify—or at least comment on—the precise nature of what the Rule of Law *is*. I do not explore the wide body of—practically or empirically focused—work that seeks to identify or test the extent to which the Rule of Law can be measured in legal or political systems of the world. In this sense, defining the scope of this chapter is relatively straightforward. What is more complicated is the provision of a working definition or attachment of a meaning to the term *the Rule of Law*. As I criticise the wide body of literature

that itself has seen much ink spilt in trying to define *the Rule of Law*, any attempt to provide a definition seems to be both imprudent and arrogant. Focussing the conceptual scope is, however, necessary to provide *some* clarity. I do not offer a definition. Instead, and before taking more time to delineate the precise boundaries of a usable conception in Chapter 3, I simply identify one feature that the Rule of Law necessarily possesses: whatever else the Rule of Law may be, I take it to be an idea that relates to a normative force acting upon the exercise of power. This broadly stated feature encompasses commonly stated Rule of Law-ideas whilst further narrowing the relative conceptual scope of the discussion and provides clarity for my argument.³ To narrow the scope further, I consider the Rule of Law only in terms of its Anglo-American conception. My reasons for doing so are three-

³ By delineating the concept this way, I do not suggest that the Rule of Law should be considered in terms akin to a 'unit idea'. ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (New ed. 1976). (See, in particular, Ch. 1, for his explanation of this idea.) Instead, in circumstances where the Rule of Law was not used as a particular phrase by many of the authors considered to be canonical, some frame of reference is necessary in order to explore the ideas relevant to this overarching and broadly defined category. The intent is to use this broad idea of the Rule of Law to identify the various thoughts that fall into a particular conceptual sphere in order that these can subsequently be used to explore the nature of the similarity or differences between those ideas. This broader application does not, however, comprise the content of and is not explored in this chapter.

fold: first, I do not consider the Rule of Law and the often-associated continental ideas of, for example, the *Rechtsstaat* or the *Etat de droit*, as being directly comparable; second, sufficient space is not available for me to consider *all* of the various Rule of Law-relevant concepts here; and, third, the literature I critique is largely focused on this same form.

In what follows, I first outline the nature of the problem before, briefly, suggesting a potential solution. In the part immediately below, I identify the common assumptions in the Rule of Law literature before, in the next part, explaining why they are inconsistent. After providing a brief re-statement of the problem, I suggest one potential way out of (or around) the problem in the penultimate part before concluding.

WHAT ARE THE ASSUMPTIONS OF THE RULE OF LAW?

‘As political philosophers,’ states Jeremy Waldron, ‘we like to keep our armoury of concepts in good shape’.⁴ Though not everyone engaged in conceptual analysis may self-identify as a political philosopher, Waldron’s

⁴ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW PHILOS. 137–164, 138 (2002).

position is sensible. However, this is not being adhered to; the political philosophers' armoury is, instead, being neglected.⁵

In the body of literature in legal or political philosophy that considers exactly what the Rule of Law *is* or that relates to the immediate impact of the terms of definition of that concept (*'the Rule of Law literature'*) there is, frequently in the opening paragraphs, a common expository passage that serves as a proxy for either a short-form literature review, a conceptual history, a definition of the concept itself, or as a summary of previous arguments. These assumptions are used to provide a foundation on which further arguments rest. They are used to strengthen the ideas of what the Rule of Law *is*. Whilst I explore the precise terms below, it will suffice here to state the assumptions briefly: first, the Rule of Law is over 2000 years old; second, there have been a number of canonical Rule of Law ideas; third, contemporary ideas of the Rule of Law differ to previous ideas of the Rule of Law; and, fourth, the Rule of Law is a highly, or essentially, contested

⁵ This is a position that Waldron himself, at least in some respects, concedes. *Id.* at 138. Of course, strict maintenance may not always be possible; Waldron goes on to point out there can be, to a point, a difference between the meaning of a concept like the Rule of Law 'on the streets' and that of its strict philosophical meaning. But, even if street level political philosophy is discounted, I have cause to doubt the truth of the initially stated position—at least insofar as it relates to the Rule of Law.

concept.⁶ I do not suggest all of the Assumptions are present in every modern Rule of Law paper; nor do I suggest that my list contains an exhaustive account of ideas that could otherwise be considered as Common Assumptions. I do, however, suggest any contemporary account that omits *all* of the Assumptions would represent an outlier and, further, the Assumptions form a recurring narrative in the Rule of Law literature.⁷ I draw on the examples below for illustration and, where multiple Assumptions occur in a single work, for citational brevity, I have sought to utilise and refer to the same account regardless of the existence of alternative sources that could also have illustrated the same point.

Through the invocation of the assumptions in the Rule of Law literature, and through the mutual reinforcement that could be said to exist when differing ideas are collectively cogent or consilient, the use of the

⁶ Collectively, I refer to these as *Common Assumptions* or *Assumptions* of the Rule of Law literature. In no way do I endorse, or suggest the correctness of, the Assumptions.

⁷ Martin Krygier has recently identified a separate (yet not inconsistent) set of common themes in the literature. He identifies various clichés of the Rule of Law that relate to the concept's: vogueishness and increasing popularity; promiscuity (as there are a number of potential commentators); and, contestability (in terms where it is 'so "essentially contested"'). Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANNU. REV. LAW SOC. SCI., 1 (2016).

Assumptions is intended to provide a solid foundation—a platform—on which more substantive ideas about the Rule of Law can be constructed. The Assumptions do not, however, come together; they do not facilitate consilience by virtue of the inconsistencies that arise and, therefore, they cannot provide a foundation on which to structure further Rule of Law ideas. Despite the frequency of their invocation—and despite any suggestion that the concept of the Rule of Law should be kept in good shape—the Assumptions are not internally consistent.⁸ This situation occurs because there has been insufficient consideration of whether the Common Assumptions are correct or, indeed, whether they make sense when expressed together. In the next part, I point to the nature of this inconsistency; but, first, in the following sections, I outline the precise way each of the Assumptions are expressed.

Assumption One: The Rule of Law has Existed for Over 2000 Years

In the Rule of Law literature, accounts frequently commence with a statement of the concept's historical origins. Many accounts point to Aristotle

⁸ Here, I am not suggesting consistency across individual or disparate accounts is necessary. My suggestion relates, not to different arguments but, instead, to different assumptions on which arguments are based. I expand on this below.

and suggest he was the originator of the idea.⁹ This plays a central role in statements like these: 'The ideal of *the rule of law*, which can be traced back at least as far as Aristotle, is deeply embedded in the public political cultures of modern democratic societies.'¹⁰ and '[t]he concept of the rule of law embodies ideals that have figured in political and constitutional discourse at least since Aristotle...'¹¹ Attribution of the concept's classical origin has also been noted as a specific trend by others. In the opening sentence of his book, whilst pointing to necessary caution in doing so, Brian Tamanaha acknowledges that: 'Many accounts of the rule of law identify its origins in

⁹ See, for example, *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM*, 75 (Pietro Costa, Danilo Zolo, & Emilio Santoro eds., 2007). Some hint the concept is, potentially, older by suggesting the Rule of Law is 'at least' as old as Aristotle's account. RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 1 (2001).

¹⁰ Lawrence B. Solum, *Equity and the Rule of Law*, 36 *NOMOS* 120-147, 121 (1994).

¹¹ Martin Krygier, *Rule of Law (and Rechtsstaat)*, 38 in *THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT)* 45-59, 46 (James R. Silkenat, James E. Hickey, & Peter D. Barenboim eds., 2014). There is occasionally some hesitancy in ascribing a particular start to the concept. For example, in relation to the idea of the law ruling as opposed to rule by men, this is described as being a point that is 'as old as Hobbes; maybe even as old as Aristotle...' Jeremy Waldron, *Legislation and the Rule of Law*, 1 *LEGISPRUDENCE* 91, 101 (2007). However, not too much should be read into this hesitancy as the same author also suggests the beginnings of the Rule of Law tradition and the associated ideals 'have resonated in our tradition for centuries—beginning with Aristotle'. JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY: THE HAMLYN LECTURES* 3 (2012).

classical Greek thought, quoting passages from Plato and Aristotle.¹² The fact that there has been some debate as to the content of the Rule of Law, or that it has some different facets or formulations, is also put into Aristotelian terms by some.¹³ A more general statement regarding the concept is also common. It is a point of agreement, or at least popular consensus, that the origin of the Rule of Law—as an initial formulation—can be traced, if not immediately to Aristotle (or any other individual), to the ancient or classical period.¹⁴ From

¹² BRIAN Z. TAMANAHA, ON THE RULE OF LAW HISTORY, POLITICS, THEORY 7 (2004). In the second paragraph of his article, Fallon adopts a similar approach in stating ‘Some have traced the modern ideal to Aristotle, who equated the Rule of Law with the rule of reason.’ Richard H. Fallon Jr., *“The Rule of Law” as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REV. 1–56, 1 (1997). Whilst there may be different meanings attributable to the Rule of Law, at least one is stated as being attributable to Aristotle by Judith Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1–16, 2 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

¹³ Rodriguez et al state suggest that theorists since the time of Aristotle have been interested in describing the Rule of Law in terms that ‘withstand analytic scrutiny.’ Daniel B. Rodriguez, Matthew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY LJ 1455, 1464 (2009) (citations omitted).

¹⁴ Waldron suggests it has been a hugely important tradition for millennia. WALDRON, *supra* note 11 at 7. And, in referring to an Aristotelian passage stating that law should govern, Møller & Skaaning state ‘These sentences were written by Aristotle over two millennia ago (in Politics, 3.16), and they go to show that the ideal of the rule of law is ancient.’ JØRGEN MØLLER & SVEND-ERIK SKAANING, THE RULE OF LAW: DEFINITIONS, MEASURES, PATTERNS AND CAUSES 2 (2014). As part of a discussion related to the idea of a government of laws and not men, John Phillip Reid states: ‘These

these limited examples, I hope it will be clear that it is possible to observe—and to do so without committing to the accuracy of the claim—that a common assumption exists in the literature that the Rule of Law is ancient and, probably, originated with Aristotle. In this sense, the classical origin of the concept forms the First Common Assumption of the Rule of Law.

Assumption Two: Citation of Various—and Particular—Rule of Law Canons

Rule of Law accounts frequently invoke, relate, or refer to various canons of the concept. Here, I use ‘canons’ of the Rule of Law simply as a shorthand to refer to the Rule of Law authors’ accounts that are most-invoked or referred to in the literature (and not in a way that suggests, or endorses that, the accounts *should* be accorded more authority than any others). In giving this caveat, and in the exposition of this Assumption, I adopt a position that neither contradicts nor endorses Radin’s statement that, in relation to the Rule of Law itself, ‘... there is no canonical formulation of its meaning...’¹⁵ For the purposes of my argument, they represent the ‘go to’ authors common to

words not only encapsulate the essence of rule-of-law, they have echoed over the centuries even back to classical times...’ JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 5 (2004).

¹⁵ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. LAW REV. 781, 781 (1989).

many Rule of Law accounts. Of the philosophers' and political thinkers' conceptions frequently invoked or deployed, the field is substantial. As noted in Chapter 1, Møller & Skaaning suggest '... listing the philosophers and political thinkers who have celebrated [the ideal of the Rule of Law] reads as a 'Who's Who?' of Western political thought.¹⁶ In identifying core Rule of Law thinkers whose accounts are frequently invoked, this–non-exclusive–list could include Plato, Aristotle, Montesquieu, Hobbes, Locke, Hume, Kant, Dicey, Hayek, Fuller, Habermas, Dworkin, Raz, Radin, Bingham, Waldron, and Rawls. My identification of these thinkers does not result from any particular scientific rigour or empirical selection criteria. These usual suspects will be familiar to anyone with anything more than a passing familiarity with the Rule of Law literature.¹⁷ Whilst reliance on a single thinker's position is rare—especially given the frequently invoked contested nature of the concept explored below—there is, routinely, specific recognition provided to A. V. Dicey. Dicey's

¹⁶ MØLLER AND SKAANING, *supra* note 14 at 2.

¹⁷ Reference is made to some, or all of these, in works by: Jeremy Waldron, *Stare Decisis and the Rule of Law: a Layered Approach*, 111 MICH. LAW REV. 1, 4 (2011); CHARLES SAMPFORD ET AL., RETROSPECTIVITY AND THE RULE OF LAW 14 (2006); REID, *supra* note 14 at 5–8; H. W. Arndt, *The Origins of Dicey's Concept of the "Rule of Law"*, 31 AUST. LAW J. 117 (1957); WALDRON, *supra* note 11 at 3–4; Krygier, *supra* note 1 at 65; Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2016 ed. 2016), <http://plato.stanford.edu/entries/rule-of-law/> (last visited Jul 20, 2018).

account of the Rule of Law has been referred to as being famous,¹⁸ the most famous,¹⁹ or the most influential.²⁰ Reid—by way of criticism of Radin’s sentiment that there is no canonical formulation of the Rule of Law²¹—suggests it was Dicey who cast the Rule of Law into canon.²² Of course, Reid’s statement exists in at least partial opposition to the position stated by Arndt: that the Rule of Law, whilst formulated differently to the Diceyan vision, was seen as something different for earlier thinkers.²³ This relative fame could be attributed to Dicey’s popularisation of the phrase *the Rule of Law*.²⁴ Arndt’s caution—that the Rule of Law, in the Diceyan form did not exist until the 1860s

¹⁸ CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* 34 (2014).

¹⁹ Fallon, *supra* note 12 at 1.

²⁰ Solum, *supra* note 10 at 122.

²¹ Radin, *supra* note 15 at 781.

²² REID, *supra* note 14 at 7–8.

²³ Arndt, *supra* note 17 at 117.

²⁴ Of course, terms like ‘the empire of laws and not of men’ had been invoked in the mid-seventeenth century and, arguably, before; for example, in using this phrase, Harrington paraphrases an Aristotelian sentiment. See, for example, JAMES HARRINGTON, *HARRINGTON: “THE COMMONWEALTH OF OCEANA” AND “A SYSTEM OF POLITICS”* 8–9 (J. G. A. Pocock ed., 1992). Waldron, too, recognises this: ‘It is sometimes said that Dicey in 1885 was the first jurist to use the phrase “the Rule of Law.” I don’t think that’s true, except in the most pedantic sense of the exact grammatical construction.’ WALDRON, *supra* note 11 at 7.

and that it meant 'very different things to Bracton, Coke, Locke and Dicey.'²⁵—should, however, be kept in mind. Despite the disputation, what is clear is that there are, and have been, a number of popular—or at least frequently invoked—accounts of what the Rule of Law *is*. These canonical accounts are frequently cited, and referred to, in the literature in a way that suggests they represent basic statements of the Rule of Law. This, therefore, forms the second Common Assumption of the Rule of Law.

Assumption Three: Contemporary Conceptions Differ to Historical Conceptions

In terms where a number of canonical accounts are provided in different terms over the course of more than 2000 years, it may seem trite to—specifically—recognise that contemporary conceptions of the Rule of Law differ from earlier conceptions. Nevertheless, it is important to do so as this obvious factor is also—specifically—recognised in the Rule of Law literature. Not infrequently are the generalised differences specifically stated; for example, extracting an example that relates to both Assumptions One and Two, Todd Zywicki states 'Dicey's characterization of the modern content of the rule of law may be distinguished from the ancient "classical" conception

²⁵ Arndt, *supra* note 17 at 117.

of the rule of law, such as found in Aristotle.²⁶ Whilst explicit reference is also often made to the change or difference in conceptions over time,²⁷ some authors make explicit, yet more oblique, reference to historical differences; for example: Fallon states '[t]he Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before.'²⁸ Acknowledgement of the implicit change in the Rule of Law is

²⁶ Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, SUPREME COURT ECON. REV. 1-26, 3 (2003). Shklar also contrasts and compares the specific differences between a number of historical conceptions in the opening paragraphs of her frequently cited work. Shklar, *supra* note 12 at 1-3. Zywicki, at note 5, references Shklar's work in relation to identifying the differences between the ancient and modern ideas of the Rule of Law.

²⁷ REID, *supra* note 14 at 3-4. This also extends to differences between conceptions at various points in the past; for example, Arndt specifically states Dicey's conception cannot be traced back to conceptual origins in the middle ages or, even, to Locke. See, for example, Arndt, *supra* note 17 at 117.

²⁸ Fallon, *supra* note 12 at 1. Further, Krygier describes the impact of the differences in conceptions over time in this way: 'The rule of law is today more talked about in more places by more people than perhaps ever in its history, but that does not mean it is any clearer in meaning or significance, or better understood.' Martin Krygier, *Inside the Rule of Law*, RIV. FILOS. DIRIT. 77-98, 77 (2014). Krygier also suggests the concept's recent rise to prominence and the variety of conceptions results in it being 'rendered increasingly murky what the concept might mean, what the phenomenon might be, and why anyone should care.' Krygier, *supra* note 7 at 1. For an illustration of the different historical approaches to Rule of Law conceptions, see the special issue, edited by Neil Walker and I, devoted to the operation and applications of the

apparent not only from the specific discussion in the literature but also in the structure and commentary provided in various Rule of Law texts. For example, the concept's historical background is provided by Brian Tamanaha across the first six chapters of his book.²⁹ An apt description of the position taken in relation to the Rule of Law is that it is a historic ideal—which could be taken to mean earlier ideas have some point of difference to contemporary ideas³⁰—or in terms where there has been a 'historical evolution'.³¹ As a further illustration of a point of difference, the modern trend toward the incorporation of 'thick' ideas into the Rule of Law—in particular notions of human rights and democracy³²—also differs substantially in comparison to Rule of Law ideas

Rule of Law through history: Special Issue on the History of the Rule of Law, , 9 HAGUE J. RULE LAW (2017).

²⁹ TAMANAHA, *supra* note 12. Christopher May characterises Tamanaha's account as describing a 'historically shifting norm'. MAY, *supra* note 18 at 37. Further implicit reference to the change in the conception is apparent through Reid's hope to identify how the Rule of Law 'once functioned'. REID, *supra* note 14 at 4.

³⁰ Radin, *supra* note 15 at 781.

³¹ Olufemi Taiwo, *The Rule of Law: The New Leviathan*, 12 CAN JL JURISPRUD. 151, 152 (1999).

³² Ideas in these terms are not explored here in preference for a conceptually cleaner and clearer examination. An exploration and outline of formal and substantive ideas can be found in Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, PUBLIC LAW 467-487 (1997). For a further example of these

produced by earlier thinkers. In these terms without committing to the truth-value of the stated positions, there can be little doubt that the dominant assumption in the Rule of Law literature is that the Rule of Law, or at least conceptions of the Rule of Law, have varied over time. These differences are evident in either ideas associated with the concept itself or with the canons' conceptions of the same. This, then, provides our Third Common Assumption of the Rule of Law.

Assumption Four: The Rule of Law is a Highly (or, even, essentially)

Contested Concept

There is an accepted or at least acknowledged ambiguity or imprecision in the statement or articulation of the Rule of Law. This much is likely apparent from the various examples provided above. In the paragraph opening his book, Reid describes the idea of the Rule of Law in these delightful terms:

... we are standing on a slippery slope. The ground is not only slick, it is covered with the grease of jurisprudential ambiguity and the treacherous underfooting of imprecise definition. "Rule of law" is an expression both praised and ridiculed by adherents

ideas in the international sphere, see Paul Burgess, *Deriving the International Rule of Law: an Unnecessary, Impractical and Unhelpful Exercise*, (FORTHCOMING).

of opposite political philosophies, and it is a principle claimed as the lodestar for widely differing legal theories.³³

It is useful to, once again, specifically state what may, nevertheless, be obvious for the purposes of evidencing the Common Assumptions:

Conceptions of the Rule of Law are not only long lasting, commonly invoked and varied, but also are frequently pitched in opposition to one another.

Some, however, deny an element of contest by suggesting there exists a fairly well understood conceptual core.³⁴ The large number of conceptions is, nevertheless, readily acknowledged by many.³⁵ These conceptions are 'often conflicting and not infrequently rather confused'.³⁶ This has led to the suggestion that the very idea of the Rule of Law is—itsself, and in the least—deeply contested.³⁷ There is increasingly a common thread in the literature

³³ REID, *supra* note 14 at 3.

³⁴ Zywicki, *supra* note 26 at 3. See also Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. RULE LAW 48–74, 50–51 (2010); James A. Grant, *The Ideals of the Rule of Law*, 37 OXF. J. LEG. STUD. 383–405, 387 (2016). See also, Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. LAW 331–362, 342 (2008).

³⁵ For the suggestion that it may be best 'to understand the ideal of the rule of law as a set of ideals connected more by family resemblance than by a unifying conceptual structure' see Solum, *supra* note 10 at 121.

³⁶ Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW PHILOS. 1–43, 1 (2004).

³⁷ Radin, *supra* note 15 at 781.

that accepts the concept may even be properly characterised as being essentially contested (in the Galliean sense).³⁸ Waldron's 2002 paper³⁹ is generally cited in support of this position.⁴⁰ Some are more cautious. Krygier states 'Like many other important moral, political and legal ideals, among them democracy, justice and liberty, [the Rule of Law's] meaning, scope, conditions and significance are all highly, perhaps essentially contested.'⁴¹ Some commentators, as I do here, simply report on the adoption or relative

³⁸ W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOT. SOC. 167–198 (1955).

³⁹ Waldron, *supra* note 4. (Which, in turn, references the suggestion of essential contestability by Fallon: Fallon, *supra* note 12.)

⁴⁰ Krygier, *supra* note 7 at 1. In conjunction with sentiments that the Rule of Law's contestedness 'strongly indicate[s] that the Rule of Law is an essentially contested concept' see MØLLER AND SKAANING, *supra* note 14 at 7. Regarding the idea that that 'the rule of law seems to be an essentially contested concept' see Ryan E. Carlin & Rodolfo Sarsfield, *Rethinking the Rule of Law: Concepts, Measures, and Theory*, 33 JUSTICE SYST. J. 125–130, 125 (2012); Jørgen Møller & Svend-Erik Skaaning, *Systematizing Thin and Thick Conceptions of the Rule of Law*, 33 JUSTICE SYST. J. 136–153, 137 (2012). See also, Jeffrey K. Staton, *Rule-of-Law Concepts and Rule-of-Law Models*, 33 JUSTICE SYST. J. 235–241, 235 (2012). (Acknowledging the contested nature of the concept—in the Waldronian sense—is a concern in the literature.)

⁴¹ Krygier, *supra* note 11 at 46 (citation omitted).

acceptance of this characterisation in the literature,⁴² whilst others merely report on the trend.⁴³ One notably absent reference to Waldron's ever-popular categorisation of the Rule of Law as *essentially* contested comes from Waldron himself. In the Stanford Encyclopedia of Philosophy entry for the Rule of Law, Waldron outlines—in a section entitled *The Contestedness of the Rule of Law*—the general contestation prevalent in the literature but makes no reference to the concept as being *essentially* contested.⁴⁴

This all adds up to a general acceptance that the concept is at least (generally) contested. What is nevertheless clear is that there appears to be an *ongoing* contest between the various Rule of Law ideas. A number of Rule

⁴² Tamanaha states simply that 'Legal theorists have called it an "essentially contested concept".' Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAP. J. LEG. STUD. 232–247, 232 (2012).

⁴³ For example, by stating: 'Theorists since Aristotle have been primarily interested in fashioning a coherent description of [the Rule of Law] that can withstand analytic scrutiny. Nonetheless, there are those who believe this to be a fool's errand—that the rule of law is an "essentially contested concept."' Rodriguez, McCubbins, and Weingast, *supra* note 13 at 1464 (citations omitted).

⁴⁴ Waldron, *supra* note 17. I do not suggest Waldron rejects or resiles from his earlier position. It does, however, seem that, for him at least, the question of *essential* contestedness is not sufficiently accepted—despite the widespread citation and adoption of his own position—to warrant inclusion in an encyclopaedia entry. For more on the contest between conceptions of the Rule of Law, see Chapter 3.

of Law-ideas are postulated in terms that differ in their precise formulation from one another yet remain connected by virtue of: the idea's author's explicit intention to contribute to the Rule of Law discussion; or, alternatively, through a subsequent discussion that seeks to incorporate earlier ideas—in which no explicit reference is made to the Rule of Law or any other Rule of Law theories per se—into the subsequent Rule of Law discussion. Whether this situation results in essential contestability—in the truly Galliean sense—appears to, itself, be contested. In essence, there is a continued debate as to the meaning of the concept across both time and geography.⁴⁵ Whilst early accounts associated with Rule of Law ideas infrequently, if at all, relate their ideas to the precise context of one another—for example, there is no explicit mention of either the Rule of Law or Hobbes's accounts of that idea by Locke—there is explicit engagement and discussion across contemporary writers. For example, after acknowledging Hayek's definition as 'one of the clearest and most powerful formulations of the ideal of the rule of law', Raz uses his critique of Hayek as a springboard into his own formulation of the idea.⁴⁶ Furthermore, it will be apparent from the contemporaneity of the citations

⁴⁵ Chesterman, *supra* note 34 at 340.

⁴⁶ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (2 ed. 2009). For Hayek's definition, see FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., 2007).

relating to the contested nature of the concept, the contest—or at least the popularity of citing the contest as continuing—subsists.

It is, then, clear that there are a number of different conceptions associated with the concept of the Rule of Law either at a specific point in history—in comparing a single historical conception to one from the present—or in relation to its contemporary conception. The accuracy and / or appropriateness of the *essential* contestability remains a topic that is debated and explored in the literature and the very existence of the debate, itself, forms part of the literature. It is on this basis that the observation of the contested status of the Rule of Law comprises our fourth Common Assumption.

WHY ARE THE ASSUMPTIONS INCONSISTENT?

Even on the basis of my brief examination, it is apparent that a number of very different, often opposing, conceptions have been presented and accepted, in the Rule of Law literature. Before moving forward in the thesis more generally, it is necessary to expand the nature of these inconsistencies. After all, the rationale for the broader research question—that fundamentally seeks to illustrate the nature and benefit of considering the mechanism of

change across conceptions of the Rule of Law—stems from the existence and prevalence of these inconsistencies.

The four Assumptions are frequently stated and presented without principled argument; they are accepted as part of the Rule of Law's conceptual narrative. Notwithstanding this acceptance and frequency of presentation, I will, in the final section in this part and with a view to establishing why the wider question raised in this thesis is relevant, outline why the Assumptions' use creates inconsistencies in the account. To make this point, it is, however, useful to first address a preliminary question: is it even *possible* for the Assumptions—where they are characteristically distinct and could be seen as relating to very different aspects of the Rule of Law—to be sensibly considered as being consistent or inconsistent with one another? To provide a positive answer to this question—and before going on to illustrate that the Assumptions are not, in fact, consistent—I consider the opposing question: are the Assumptions *too different* to be considered as being consistent or inconsistent?

Where the assumptions could be classified as relating to historical, analytical, or ontological characteristics, it could be suggested that it is not appropriate to assess their consistency as they relate to very different aspects

of the concept of the Rule of Law.⁴⁷ Should this be the case, attempts to locate consistency could be seen as akin to assessing whether the quality of a novel together with the kind of tree used to make the paper on which the text is printed are consistent; whilst both could be seen as reflecting the quality of the book (more generally), and whilst both may be *separately* relevant to its quality (in the broadest sense), there is no reason to expect or require consistency between the two characteristics. The Assumptions, however and notwithstanding their different characteristics, should not be viewed in this way. It is possible to assess their consistency by virtue of the fact that they are each being used to collectively illustrate what the Rule of Law *is*; the Assumptions are *together* being used to provide a conceptual background and to support a particular view of the concept. In the book example, the parallel is in value: *both* the words and the paper stock impact the book's value. Value draws the characteristics together in a way that may require some level of consistency. In returning to the Assumptions, by virtue of their being brought together in this particular endeavour, their differences in character can be viewed together and can sensibly be assessed in terms of consistency / inconsistency. Further, where the Assumptions are collectively

⁴⁷ I am grateful to Andrew Lang (London School of Economics) for suggesting expansion of this point during discussions of my argument in this chapter.

being used in a way that promotes consilience, the collective cogency of the Assumptions is necessary for conceptual clarity. Before I outline why the Assumptions' use creates inconsistencies in the account generally, it is useful to first pause and reconcile the Assumptions into a collective sentiment.

Change (Over Time and by Thinker) in Rule of Law Ideas

The fundamental point of relative agreement that is evident when the Assumptions are considered together is *change*. This could be put something like this: ideas of what the Rule of Law *is*—and the use of those ideas—have varied over time.⁴⁸ This is most apparent in Common Assumption Three.⁴⁹ However, it is also a necessary feature across the other three Assumptions. The fact that there are a number of Rule of Law conceptions and no definitive—agreed—statement of exactly what it *is*, speaks not only to the fact that there is a difference across time and across each author's conception, but also to the fact that there has been some form of change over time. So, to say that the idea of the Rule of Law has changed over time appears to be—when

⁴⁸ This observation is, of course, far from revolutionary and has been noted by a number of authors. For example, Bedner states: 'Rule of law definitions seem bound to vary over time, place, context, and from author to author.' Bedner, *supra* note 34 at 48 (citation omitted).

⁴⁹ Assumption Three: Contemporary Conceptions Differ to Historical Conceptions.

the Common Assumptions are considered individually—a relatively uncontroversial notion.⁵⁰ Notwithstanding this fundamental point of relative agreement, problems creep in if we consider the assumptions in terms of different mechanisms of change. If we simply accept that there has been some change in the conceptions, it is a logical extension to question or enquire as to the nature of the change. Here, I do not intend to refer to the *micro-* mechanics of change (i.e. the influences on each canon's author's precise formulation of his or her conception). What I mean is the more general idea of change that *could* occur: the *macro-* mechanics. I do this purely as a tool to illustrate the importance of understanding how change occurred; because different forms of change can impact levels of consistency. At this macro- level, there are various ways to describe change. I consider only two—relatively binary and extreme hypothetical—mechanisms:

⁵⁰ This statement does, of course, presuppose to some extent that the various thinkers were talking about the same thing; something that, in the context of the examination of the Rule of Law literature, is also an uncontroversial idea. Whilst it will become apparent that there are difficulties with this characterisation—not least because few canonical accounts refer to '*the Rule of Law*'—it is clear is that, over time, individual thinkers' conceptions have changed. It is relevant to note here that I am making no claims as to the actual existence of a broad category of the Rule of Law as a concept; I am merely reporting on the accepted position in the literature wherein it seems to be held to be relatively uncontentious that the various canonical ideas relate to some broad concept of the Rule of Law.

evolutionary change and *revolutionary change*.⁵¹ I do not, however, suggest either mechanism *did* operate. I also do not suggest that various intermediate or mixed forms of change do not exist or did not actually operate. I do, however, suggest that by exploring these two relatively crude macro-processes of change, inconsistencies across the Rule of Law Assumptions can be illuminated.

Evolutionary change refers to a change that occurs in the way that the Rule of Law is conceived that necessarily relates to, follows on from, or expands a prior—but not only immediately prior—conception. Change in this way means the idea of the Rule of Law could be seen as a single diachronically conceived concept, the nature and meaning of which changes over time; earlier conceptions of the Rule of Law are necessarily relevant to subsequent conceptions. Within this idea, the Rule of Law could be seen in terms akin to the idea that the concept exists as a continuing tradition.⁵²

⁵¹ I return to, and reapply, these forms of change in relation to the change between Hobbes's and Locke's Rule of Law-like ideas in the final chapter.

⁵² It is in this sense that, in relation to the Rule of Law tradition, Martin Krygier applies the metaphor of the Argonauts' ship remaining the Argonauts' ship notwithstanding the fact that, over the course of a voyage, barely any original part of the ship survives. MARTIN KRYGIER, *MAGNA CARTA AND THE RULE OF LAW TRADITION* 11 (2015), <http://papers.ssrn.com/abstract=2713610> (last visited Jul 23, 2018). In drawing this comparison, and relating the tradition of the Rule of Law to that of the Common Law,

Evolutionary change is, perhaps, best understood when contrasted with revolutionary change. Revolutionary change describes discreet, unrelated, iterations of the Rule of Law as paradigm shifting events: conceptual revolutions in thought that fundamentally alter or change the way a concept is perceived; subsequent ideas are *not* necessarily reliant on earlier ideas; later ideas implicitly or explicitly supplant earlier ones.⁵³

The conception of change as being either evolutionary or revolutionary covers the field in a binary sense. As evolutionary change *necessarily* relates to a previous idea, change is either evolutionary or it is not; it is not evolutionary *without* a necessary connection to prior ideas. Without a necessary connection 'change' would be revolutionary.⁵⁴ Even without further consideration, it could be said that, should change be conceived as being revolutionary, there is no need to rely on prior ideas of the Rule of Law when

Krygier extracts MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 84 (1820).

⁵³ Here, I have in mind the Kuhnian idea that the defining characteristic of—for Kuhn, scientific—revolutions, relates to the rejection of a prior time-honoured theory, a shift in the nature of the problems available for scrutiny, and a transformation of the imagination. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 6 (4 ed. 2012).

⁵⁴ Whilst this does not account for how to categorise the very first conception, this will not impact the assessment herein.

positing a new (revolutionary) Rule of Law idea; indeed, it may make little sense to do so if any subsequent position is adopted.⁵⁵

A brief–Rule of Law-relevant–example may assist here to illustrate what I mean by evolutionary change.⁵⁶ This would mean, per my definition above, a necessary connection to a prior Rule of Law idea must exist between two conceptions. The most obvious sense of this would be where a subsequent thinker explicitly states that she is taking up, and modifying in some way, an earlier thinker’s Rule of Law position. There can also be an implicit necessary connection that would give rise to an evolutionary conception of change. In many senses, contemporary ‘thick’ versions of the Rule of Law—such as the version suggested by the United Nations (*the U.N.*)—could be seen to have a necessary connection to earlier ‘thin’ versions. The U.N. idea of the Rule of Law includes: the separation of powers; fairness; and, a requirement for laws to be ‘consistent with international human rights norms and standards.’⁵⁷ In

⁵⁵ In this respect, I have in mind something like Kuhn’s idea of irreconcilability. See KUHN, *supra* note 53.

⁵⁶ See also my comments regarding evolutionary change and innovation in relation to the Rule of Law in Chapter 1: *Our Conceptual Toolbox*.

⁵⁷ UN SECURITY COUNCIL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES - REPORT OF THE SECRETARY-GENERAL 6 (2004), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (last visited Jul 20, 2018). The U.N.’s reluctance to view the Rule of Law in formal–‘thin’–terms can be seen in its

structuring its thick idea of the Rule of Law, there must be a thin base—of whatever form that may take—upon which it sits.⁵⁸ In this sense, there is a form of evolutionary change from the earlier thin ideas that stipulate the formal content of the Rule of Law *into* the U.N.'s thicker conception.

Two things must be clarified. The first relates to the nature of (evolutionary change's) 'necessary' connection. The second relates to variations 'across' a time period. In addressing the former, the *necessary* aspect relates to a connection that would result in a fundamentally different (subsequent) conception if the prior conception did not exist. Necessity, here, has two components that must be satisfied at separate times: first, is the requirement for a connection that is more than merely incidental—a canon's mere use of the same language or turn of phrase would not be sufficient in this respect (whilst it *may* suggest their work relates to the same ideas as that

2014 Addendum, where it is stated: 'Devoid of the human rights framework, the rule of law is merely "rule by law", a term describing legal or rule-based frameworks, without a normative underpinning to secure substantive justice. Worse, so-called rule of law, without respect for human rights, can be used as a tool for the arbitrary and oppressive exercise of power.' UNITED NATIONS GENERAL ASSEMBLY, STRENGTHENING AND COORDINATING UNITED NATIONS RULE OF LAW ACTIVITIES - REPORT OF THE SECRETARY-GENERAL - ADDENDUM 15 (2014).

⁵⁸ I expand on this point in Chapter 3: *Introduction* and in *Formally Framing the Discussion*.

of the former thinker); the second requires that the connection be sufficient to have augmented the conceptual toolkit available to the subsequent canonical author.⁵⁹ For example, the fact that Hobbes's *Leviathan* temporally precedes Locke's *Two Treatises* and the fact that Locke may have, or even did, read *Leviathan* is not enough to establish a necessary connection; neither fact necessarily relates to the creation or operation of Locke's Rule of Law-like ideas.

In relation to the augmentation / identification of a conceptual toolkit, the problems of establishing influence are well known.⁶⁰ However, the methodology proposed here, and expanded throughout the other chapters,

⁵⁹ The question to be asked is whether the subsequent canon's work could have had the same meaning if the former canon's work had not been produced. Or, putting it another way, by asking whether the subsequent work's meaning relies on the (prior author's) augmentation of the subsequent thinker's conceptual toolkit.

⁶⁰ One of the most well-known accounts regarding the difficulties of establishing and illustrating a level of influence by one thinker over another is provided by Skinner. Quentin Skinner, *The Limits of Historical Explanations*, 41 *PHILOSOPHY* 199-215 (1966). However, Oakley provides a convincing exposition of the benefits of the idea. FRANCIS OAKLEY, *POLITICS AND ETERNITY: STUDIES IN THE HISTORY OF MEDIEVAL AND EARLY-MODERN POLITICAL THOUGHT* 5 (1999). ('Anxieties of Influence:' Skinner, Figgis, Conciliarism and Early-Modern Constitutionalism). Oakley's account is, in some sense, acknowledged by Skinner in later works. See QUENTIN SKINNER, *VISIONS OF POLITICS* 75 (2002).

avoids these. A detailed exegesis of conceptions sufficient to exemplify a *true* necessary connection is not possible in the space available in a thesis focused on other questions. Whilst this would be essential when more micro- level changes are considered, one is not required for the brief macro- changes explored.⁶¹ As my analysis considers both mechanisms of change, there is no need to consider or worry (at this stage) about which mechanism of change *may* have operated in individual conceptions. For this reason, in relation to this macro- examination, the basic, stipulative, definition of *necessary* provided above is, for now at least, sufficient to differentiate the two mechanisms as separate, opposing, mechanisms / binary methods of change that cover the field.

One further thing requires clarification: the nature of variations ‘across’ a time period. Here, I mean only to describe the existence of two (or more) ideas at distinct points between which there is an intervening period. I do not mean to suggest the ideas must be related nor that there must be a

⁶¹ Nevertheless, below in *Is There a Solution?*, I suggest and briefly explore contextualising the canons as one possible solution. This solution differentiates canons’ authors’ conceptions as being either a solution to that (author’s) period’s problems or whether, alternatively, the ‘solution’ is provided in response to or in consequence of something else.

conceptual connection between them.⁶² Instead, 'across' relates merely to a temporal separation between the ideas.

Inconsistencies in the Assumptions

Is there a difference in the Assumptions' cogency if we categorise the change as being either evolutionary or revolutionary? Do the Assumptions make sense under both mechanisms? I suggest the former question should be positively answered but the latter should not; either mechanisms' operation fundamentally impacts the nature, extent, and frequency of the inconsistencies in the Assumptions.

If it is accepted that there has been some form of change in relation to the idea of the Rule of Law, the operative mechanism of change can impact the nature of inconsistency across the Assumptions. There are, conceivably, a number of different ways to explore inconsistencies across the assumptions. I do so via a two-stage comparison: the first considers whether the

⁶² To do so would, of course, presuppose some form of necessary connection. In this sense, my suggestion shares some common ground with Armitage's work: David Armitage, *What's the Big Idea? Intellectual History and the Longue Durée*, 38 HIST. EUR. IDEAS 493-507 (2012). See also, DAVID ARMITAGE, *CIVIL WARS: A HISTORY IN IDEAS* (2017).

Assumptions *themselves* are compatible. For example, whether Assumption One is consistent with Assumption Two, and whether Assumption Two is consistent with Assumption Three, etc. I describe these as *Assumption pairs*. The second stage considers whether the Assumption pairs' consistency is impacted when considered in the two change mechanisms' context. In taking this approach, I do not describe *every* possible pairing of Assumptions. I also do not deny there are various instances of consistency between Assumptions. I simply describe the most obvious inconsistencies and, then, outline the problems that follow to make apparent the scope of inconsistency. I illustrate that, regardless of the change mechanism's operation, various inconsistencies subsist; yet, the nature and extent of inconsistency varies depending on the mechanism of change.

In the following sections, I illustrate the essentiality of identifying the way in which change in the Rule of Law does occur or, more accurately, has occurred. I do not, however, suggest either change mechanism should be 'adopted' simply because it results in a more compatible set of Assumptions.

Assumption pairs: general compatibility

Assumption pairs do not *immediately* contradict one another. This superficial compatibility should, in circumstances where the Assumptions are

so frequently invoked, be no surprise. For example, Assumption One and Assumption Four,⁶³ can sit comfortably side by side; the Rule of Law can conceivably have existed for a long period whilst, over that duration, its precise boundaries have been contested. Notwithstanding this general compatibility, *some* tension can be identified between Assumptions One and Three.⁶⁴ The existence of different Rule of Law ideas over time may suggest a lack of conceptual consistency; but this is not immediately reflected in the idea that the Rule of Law has existed for two millennia.⁶⁵ Nevertheless, despite this minor tension, the various Assumptions are, at least, broadly compatible.

Evolutionary change: no obvious inconsistency

When *individual* Assumptions are considered in terms of the mechanism of evolutionary change there is no obvious inconsistency. For example, when considering Assumption Two,⁶⁶ it is appropriate that there

⁶³ Assumption One: that the Rule of Law has existed for over 2000 years.

Assumption Four: the Rule of Law is a highly or essentially contested concept.

⁶⁴ Assumption One: that the Rule of Law has existed for over 2000 years.

Assumption Three: contemporary Rule of Law ideas differ from older ideas.

⁶⁵ This may be reconciled through differentiating *the concept* of the Rule of Law and various *conceptions* of the same.

⁶⁶ Assumption Two: a number of canons of the Rule of Law exist and are frequently cited.

would be citation of previous Rule of Law canons in circumstances where each Rule of Law idea necessarily relies on earlier ideas of the Rule of Law. The same can largely be said for each of the other Assumptions in relation to evolutionary change. The same result obtains when the Assumption pairs are considered in evolutionary change terms. By way of a brief example, when viewed this way, there is no immediate inconsistency between Assumptions Three and Four.⁶⁷ The obvious way contestability—perhaps, even, *essential* contestability?—could arise is as a result of the evolution of ideas of the concept over time giving rise to competing ideas at a later stage that do not supplant completely the original idea.⁶⁸ There is even one way in which consideration of the mechanism of evolutionary change can *improve* the Assumptions' relative relationship: The slight tension between Assumptions One and Three noted in the paragraph above, appears to be either avoided or lessened. If the two millennia old Rule of Law has evolved and contemporary ideas differ to early ideas, differences would be expected. By pitching different conceptions at opposite temporal ends of a process of

⁶⁷ Assumption Three: contemporary Rule of Law ideas differ from older ideas.

Assumption Four: the Rule of Law is a highly or essentially contested concept.

⁶⁸ Whilst this requires that the earlier ideas—or, at least, some aspects of them—are not completely debunked or overridden by subsequent ones, it is clear that this is something that has, undoubtedly, happened with certain ideas associated with the Rule of Law.

conceptual evolution, there is some remedial effect by considering change in terms of an evolutionary mechanism.⁶⁹

Whilst there are no obvious inconsistencies, there is one, somewhat, strained relationship between evolutionary change and the Assumption pairs One and Four.⁷⁰ The assumptions pull in (slightly) different conceptual directions, and evolution provides an unsatisfactory reconciliation. It is only if the Rule of Law is accepted as an overarching concept that it can be said to have *existed* for this extended time, yet the contest between ideas—especially if seen as essentially contested—suggests several ideas exist at the *same* conceptual moment. It could be suggested that the various contemporary and contemporaneous ideas of the Rule of Law may have resulted from the evolution itself; yet, there is some strain placed on that relationship. Nevertheless, there is, on the whole, an intuitively appealing link between the mechanism of evolutionary change and both the Assumptions and Assumption pairs. Any slight tensions, however, pale into insignificance when compared to those flowing from the revolutionary relationships.

⁶⁹ As will become apparent, this remedial effect is not something that occurs in respect of revolutionary change.

⁷⁰ Assumption One: that the Rule of Law has existed for over 2000 years.

Assumption Four: the Rule of Law is a highly or essentially contested concept.

Revolutionary change: substantial inconsistency

The overwhelming suggestion thus far is that there is compatibility or, at least, no substantial *incompatibility* between the Assumptions and Assumption pairs. Whilst this can be said for some relationships regarding the revolutionary mechanism, the majority of revolutionary change-relationships result in various forms of incompatibility: Two inconsistencies result from considering each of Assumptions One and Two individually; and further inconsistencies result from Assumption pairs: One/Two; One/Three; One/Four; and Two/Four.

It is useful to first point to two additional ambiguities. I identify and differentiate them this way as a conflict *may* arise depending on the relative position adopted. Both ambiguities involve considering the Rule of Law as a contested concept (Assumption Four) in revolutionary change-terms. The first relates to the comparison of that Assumption alone; the second relates to its pairing with Assumption Three.⁷¹ It could be said that there is no incompatibility as a contested concept does not—in terms of revolutionary change—necessarily require a connection to prior ideas. However, it could also be said that there must be an overarching conceptual category in which

⁷¹ Assumption Three: contemporary Rule of Law ideas differ from older ideas.

those conceptions exist. If the Rule of Law is viewed in these terms, there seems to be no revolutionary change in relation to any overarching ideal of the concept itself. In considering the Assumption pair (of Assumptions Three / Four) in revolutionary terms, there is an additional tension resulting from the requirement that contemporary ideas relate to an *individual* conception of the Rule of Law, whereas the contested notion points more toward the overarching concept or classification of the Rule of Law. Whilst these relative ambiguities could conceivably be explained away, some level of tension subsists.

As to the inconsistencies themselves, the first relates to the individual Assumptions and revolutionary change. These particularly relate to the need to refer to or reference either the long-term existence of the Rule of Law (Assumption One), or the citation of canons (Assumption Two). If a Rule of Law conception has no necessary relationship to any previous conception, there is, pursuant to revolutionary change, no need to refer to things that have gone before. This does not mean that the mere mention of a history is, of itself, incorrect. The point is simply that in describing what the Rule of Law

is (in revolutionary change-terms) there is no need to do this and, hence, there exists a relative level of inconsistency.⁷²

A similar inconsistency occurs when various Assumption pairs—including Assumption Four and, firstly, Assumption Two and, secondly, Assumption One⁷³—are considered in terms of revolutionary change. The issues related to Assumption Four outlined above, are compounded by the association of the related ideas in Assumptions One and Two. When viewed in revolutionary terms, there is a fundamental inconsistency between asserting that an idea has existed for some time and that there is benefit in citing its canons. If the idea is not necessarily connected to what has come before the reference to an idea being old must relate to *that* idea and would have no conceptual relationship to any modern idea. Accordingly, there is, once again, little benefit or need for a thinker or commentator to relate their position to earlier ideas or conceptions that pre-date the particular one adopted. Two further inconsistencies arise in relation to revolutionary change. Both relate to pairings with Assumption One. The first with Assumption Two

⁷² This forms a recurring theme throughout the inconsistencies more generally.

⁷³ Assumption Four: the Rule of Law is a highly or essentially contested concept. Assumption Two: a number of canons of the Rule of Law exist and are frequently cited. Assumption One: that the Rule of Law has existed for over 2000 years.

and the second with Assumption Three. For the former pairing, once again, the purpose of citation of earlier canons seems irrelevant. In relation to the latter—the idea of a revolutionary change that comports with contemporary ideas being different to those in the past—the Assumptions could be seen as being largely inconsistent with the long-term existence of a single idea.

WHAT IS THE PROBLEM?

What is apparent is that there are a number of inconsistencies. However, even if I have not provided a sufficiently convincing argument in respect of *all* of the instances of inconsistency, for the purposes of the problem identified below, all that needs to be established is that there is a relative *difference* in the nature and scope of the inconsistencies across the two change mechanisms. Regardless of the persuasiveness of my arguments in relation to *particular* inconsistencies, this relative difference is obvious.

As a result of the differences in levels of inconsistency when change mechanisms are considered, the problem that exists in the Rule of Law literature is this: without the clear identification of the *actual* change mechanism that has operated across ideas of the Rule of Law—something that we do not yet have—there is no way to assess whether the Assumptions are, or can be, compatible with one another. The substantial inconsistencies are

largely, although not exclusively, clustered around the idea of revolutionary change. This is not to suggest that the evolutionary view of change should be considered the 'correct' idea or true reflection of the mechanism of Rule of Law change.⁷⁴ What is, however, clear is that the way in which change is conceived is relevant to the relative correctness or appropriateness of the statement of the Assumptions in the literature. Identifying the mechanism of change will enhance the conceptual clarity in the Rule of Law literature and will assist in identifying which approaches and Assumptions should be abandoned. This chapter is not the place to solve this problem.⁷⁵ I do, however, suggest in exceedingly brief terms one way this could be achieved.⁷⁶

⁷⁴ This conclusion cannot follow from the macro- level change considered here.

⁷⁵ Solving the problem would require an assessment of the change in Rule of Law ideas over time to ascertain whether the change should properly be seen as evolutionary or revolutionary. One step in this process is taken in this thesis more generally: in identifying the change mechanism between Hobbes's and Locke's Rule of Law-like ideas. However, more work on a much wider range of thinkers is necessary. I return to the further-research question in the concluding chapter.

⁷⁶ After briefly introducing the idea here, I expand upon the methodology in Chapter 4, and then augment the idea further in Chapter 5.

IS THERE A SOLUTION?

The solution to the problem posed at the start of this chapter—that the operation and extent of inconsistencies cannot be clarified without the relevant and operative mechanism of change being identified—can, obviously, be solved through identifying the mechanism of change that has occurred across various Rule of Law accounts. One way to do this is to identify precisely what (a particular conception of) the Rule of Law is (or, more properly, was) at the individual points in time under consideration; and then assess the difference between the individual points to define the boundaries of the operation of the mechanism of change. The Rule of Law literature spends surprisingly little time, and includes little analysis, in this regard. This absence is one of the reasons why the Assumptions, and the inconsistencies outlined above, exist. A contextual examination of canonical Rule of Law ideas will remedy this; it will illustrate exactly what the Rule of Law was (for each author) and, when compared to a subsequent canonical conception, will enable the mechanism of change—as a result of any necessary reliance on a prior idea—to be identified.

The methodology proposed below is not completely revolutionary,⁷⁷ but it is novel in its application to the Rule of Law. A detailed literature explores the context in which many of the texts that form the canon of Rule of Law were authored; yet this literature does not include focus on the Rule of Law itself. The two strands of literature—the contextualist examination of various periods and the impact on canonical authors, and the Rule of Law literature relating to the conceptual content of the Rule of Law—have not been brought together. This is to the detriment of the solution to the problem outlined in this chapter. To address this, the suggested contextualist methodology provides a new way to consider Rule of Law ideas in a way that will, hopefully, be appealing and intuitive. This is not to say that the operation of one process of change in the past requires the same to occur in the future, nor is it to say that only one mechanism of change has occurred across *all* conceptions of the Rule of Law. Nevertheless, identifying a particular change mechanism between individual pairs of accounts—especially those that follow one another in time—would be useful and would identify the change mechanism between *those* accounts. The individual consideration and identification of change mechanisms would be, in this limited respect, useful

⁷⁷ For a broadly similar idea and methodology regarding serial contextualism (relating to the concept of Civil War) see Armitage, *supra* note 61.

in bringing *some* conceptual clarity to the Rule of Law literature. If we fail to do this, we will be taken no further in addressing the problem identified.

Change across the periods can only be considered—and, hence, the identified problem be answered—once this has happened. Two questions follow from this simple account: first, how can we assess—in terms of the Rule of Law—exactly what the concept was for a particular canon at a particular time? And, second, how can we assess the nature of the change across different times?

How can we Assess What the Rule of Law is / was for a Particular Canonical Author?

I provide only one possible answer—briefly, and without making the bolder claim that this methodology is necessarily paramount—based on a single uncomplicated premise: a canonical author’s idea of the Rule of Law represents his or her solution to Rule of Law-relevant problems perceptible by the author at that time. The requirement that a mechanism of change be distinguished in order to enhance conceptual clarity imposes some (somewhat) unusual constraints on the choice of appropriate methodology.⁷⁸

⁷⁸ For example, the contest surrounding the concept’s content, plus the absence of any accepted definition renders, in large part, the school of conceptual history (*Begriffsgeschichte*)—most frequently associated with Reinhart Koselleck—difficult (though not impossible) to apply. The absence of the consistent use of the term ‘Rule

In adopting the methodology below, I use a number of broad based ideas to suggest a way to ultimately bring conceptual clarity to the problem associated with the identification of which Assumptions should be retained. The selective adoption of methodologies allows a clarity to be brought to the problem in a way that does not do violence to the methodological theorists' original ideas.⁷⁹ Should my methodology be criticised for cherry-picking, no real defence can be mounted other than to point to the usefulness of the methodology in addressing the problem identified. A further complication cannot be ignored: many of the canons of the Rule of Law did not use the phrase *the Rule of Law*. As this bars simple identification of a linguistic

of Law' across what are considered to be the canons of the Rule of Law results in many of that school's practices being both limiting and limited. Whilst this is not the place for a detailed comparison of the relative pros and cons of the two schools, the ambiguity and contest associated with the term and the concept caused me to prefer the hybrid version of the Cambridge School of intellectual history detailed below.

⁷⁹ In adopting this methodology, I do not wholly endorse, or criticise any particular theorist's method. For example, whilst Skinner's various methodologies and his aim to establish what an author was doing are both relevant and useful, linguistic contextualism is not adopted in its entirety. In addition, whilst Collingwood's logic of question and answers is of principal relevance, the wider gamut of his ideas is not endorsed.

concept through the identification of a particular phrase,⁸⁰ I adopt a hybrid methodology. Nevertheless, I do not abandon fundamental ideas associated with contextualist historical approaches that may otherwise be useful.

Through this approach, it is, then, the precise meaning, interpretation, and operation of the problem (in relation to *that* author) that necessitates an appreciation of the context in which the author's solution is offered. The conception itself could be seen as part of a dialogue (of sorts) as the societal position and the Rule of Law conceptions exist as part of a problem / solution relationship.⁸¹ By considering canonical Rule of Law ideas as solutions to the

⁸⁰ In this sense, the charting of the transformation of a particular enunciated concept—for example, 'liberty' or 'state'—requires a different examination to that which is required in relation to the Rule of Law literature.

⁸¹ The Rule of Law has itself previously been described as a solution concept. Waldron, *supra* note 4 at 158. However, it should be noted that Waldron makes this assertion in terms where he considers the problem to be identifiable—of how to make law rule, rather than men—whilst it remains the case that we do not know how to solve it. I do not accept that this is actually—or, at least, solely—the problem to which the Rule of Law conceptions relate. See also Noel B. Reynolds, *Grounding the Rule of Law*, 2 *RATIO JURIS* 1–16, 5 (1989); Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* 327–346, 327 (Richard Nobles & David Schiff eds., 2014).

author's society's problems, it is possible to illustrate more precisely what the Rule of Law was at the point of writing. Collingwood helpfully puts it this way:

If you cannot tell what a proposition means unless you know what question it is meant to answer, you will mistake its meaning if you make a mistake about that question. One symptom of mistaking the meaning of a proposition is thinking that it contradicts another proposition which in fact it does not contradict. No two propositions, I saw, can contradict one another unless they are answers to the same question.⁸²

In adopting this idea, it seems that we can only properly understand a (Rule of Law-relevant) solution if we understand the correlative (Rule of Law-relevant) problem.⁸³ This approach has the advantage of providing two perspectives from which to consider the nature of change: the solution's, and the problem's. This approach—which I will adopt throughout this thesis in order to clarify and disambiguate the meaning of Hobbes's and Locke's Rule of Law-like ideas—facilitates refinement of any methodology based solely on consideration of the Rule of Law (as a solution *sans* problem) and provides increased precision in identifying the true nature and meaning of any

⁸² ROBIN GEORGE COLLINGWOOD, *AN AUTOBIOGRAPHY* 33 (1939).

⁸³ This relates and refers to Collingwood's characterisation in similar—but non-Rule of Law—terms in *Id.* at Chapter V. In relation to the importance of the idea of origins of the Rule of Law, see Chapter 1.

conception.⁸⁴ Further, by identifying a meaning behind the text that extends beyond merely examining the words used we are more able to satisfy the basic hermeneutic idea, and to more finely differentiate the various Rule of Law ideas. By adopting the proposed methodology, it becomes possible to contrast two Rule of Law solutions, ostensibly postulated in the *same* terms, as a result of the fact that they respond to *different* problems. (It is as a result of this utility that I apply this methodology in the context of the exploration of Hobbes's and Locke's ideas in Chapters 4 and 5.)

How can we Assess the Nature of Change Across Different Times?

In locating change in evolutionary or revolutionary terms, it will be recalled that the key determinant is whether there is, in a subsequent conception, any necessary connection to a prior conception. Identification of this connection is paramount. My adopted ideas of evolutionary and revolutionary differentiate ideas on the basis that the connection must be more than merely incidental in terms that would result in a fundamentally different (subsequent) conception if the prior conception does not or did not exist. Change is relatively easy to assess in relation to a single well-defined concept or thing over time. Simple examination of a thing at t_1 and t_2 would

⁸⁴ This idea is also expanded upon in Chapter 6: *Disambiguating Hobbes and Locke*.

reveal the nature of the change—in the simple sense—across the two points. With a concept or idea that is notoriously ill defined and where the canons may not specifically discuss '*the Rule of Law*', this is not so easy a proposition. However, putting aside for the moment any very real practical complications and difficulties that may inhere, the general categorisation of canonical accounts within the broad definition of the Rule of Law adopted here—that the Rule of Law relates to the normative force upon the exercise of power—would be possible (if not analytically ideal). So, in this sense, and in encompassing the idea of *necessity* expanded upon above, two separate ideas of the Rule of Law—at t_1 and t_2 —can be compared and contrasted to establish whether a necessary connection exists. This will, in turn, establish whether the difference between the two can be conceived as being evolutionary or revolutionary.

This comparison of multiple thinkers' positions across greater periods of time could be conducted sequentially. However, it is accepted that, in doing so, an allowance must be made for the potential that any subsequent thinker could be influenced by *any one* of the prior thinkers; not only the thinker that immediately precedes him or her in time.⁸⁵ In short, examining

⁸⁵ This approach, whilst covering an extended period, should not be conceived as a *longue durée* approach per se. However, the approach does share some common

pairs of Rule of Law accounts will yield substantial analytic benefits.⁸⁶

Sequential comparison of other canonical Rule of Law ideas, and the identification of the differences associated with necessary connections between each of those ideas, will enable the identification of the boundaries of the mechanism of change that operated across a wide spectrum of Rule of Law ideas.

CONCLUSION

The collective cogency of several fundamental assumptions within the Rule of Law literature has not previously been considered. When it is, a problem emerges that reveals substantial unclarity within the Rule of Law literature. The collective cogency of the Assumptions within the Rule of Law literature falters when they are considered in terms of different mechanisms of change, and the level of inconsistency varies when different mechanisms of change are considered. This results in unclarity. The majority of this chapter has been devoted to demonstrating the existence of this inconsistency and to illustrating that to avoid this inconsistency and, hence, the unclarity, it is necessary to identify the relevant mechanism of change across Rule of Law

ground with the idea of *serial contextualism* described by Armitage. Armitage, *supra* note 61 at 497-499.

⁸⁶ For a drawback of not adopting a historical view, see Chapter 1.

ideas. I have suggested—in brief and relatively abstract terms—one way to do this: by viewing each canonical conception in the context of its authoring and as a solution to problems that can be associated with the society in which the canonical author was writing. Doing so ensures that the wider problem identified at the start of this chapter can be solved. Accordingly, to avoid ongoing reliance on potentially inconsistent Assumptions, and to enhance clarity in the Rule of Law debate, the assessment of Rule of Law ideas in a way that achieves this end is essential.

Now that the problem has been identified, and the abstract solution has been suggested, all that remains is to add some practical flesh on the theoretical bones to provide (at least part of) the solution; accordingly, in Chapters 4 and 5, I expand upon and apply the problem / solution methodology outlined above in relation to Hobbes's and Locke's Rule of Law-like solutions. However, before that can be done, it is necessary to move beyond the basic definition of the Rule of Law that has been adopted thus far. It is to this definitional issue—and in order to enhance the conceptual clarity of the idea—to which I turn in Chapter 3.

CHAPTER 3:
THE RULE OF LAW:
BEYOND CONTESTEDNESS¹

INTRODUCTION

In this chapter, I outline a novel–theory agnostic–elemental approach to identifying Rule of Law-like ideas.² I argue that, by identifying common aims that undergird the most frequently cited conceptions of the Rule of Law, it is possible to look beyond the contestedness that is all too apparent in debates regarding the Rule of Law’s conceptual content. In taking this approach,

¹ The vast majority of this chapter is comprised by my published article: Paul Burgess, *The Rule of Law: Beyond Contestedness*, 8 *Jurisprudence* 480–500 (2017). Minor amendments have been made to facilitate the wider argument in this thesis. The article represented an expanded, amended and greatly refined statement of an idea first advanced in my LLM thesis. The argument’s use here is not only modified, but also is applied for a different purpose and in relation to a different field of study.

² In the published version of this chapter, the methodology introduced was focused on the initial identification of Rule of Law non-compliance. The idea, however, works equally well for both applications. For my original argument, see *Id.*

it is possible to identify two elements that reflect fundamental needs that are commonly held across all canonical conceptions.

The Rule of Law is undoubtedly a contested concept.³ The conceptions themselves have been described as not only conflicting but also not infrequently rather confused.⁴ The Rule of Law's contested nature is problematic for many reasons; not least of which are the potential analytical unclarity, confusion, and loss of pragmatic benefit that follows the contest of such a widely cited concept. As was stated in the previous chapter, it is this uncertainty that motivates the thesis more generally. To look beyond the contestedness, it is necessary to look beyond the widely cited Rule of Law desiderata; to do this, it is necessary to identify the fundamental needs each thinker intended to satisfy in formulating those desiderata. Through identifying the fundamental need that was being addressed, and by considering each of the most widely cited Rule of Law ideas, the identification of commonalities in the accounts is

³ For a detailed summary of the debate, see Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW PHILOS. 137-164 (2002). See also Chapter 2: *Assumption Four: The Rule of Law is a Highly (or, even, essentially) Contested Concept*.

⁴ Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW PHILOS. 1-43, 1 (2004).

possible. This allows the distillation of two Rule of Law elements: Comprehension and Procedural Pellucidity. (The elements' operation is not exclusive even though they exist, and overlap, on a spectrum between processes and outcomes: Procedural Pellucidity—at the processes end of the spectrum—relates to norm-makers and appliers; and Comprehension—at the outcomes end—relates to norm followers.)⁵ The elements: are derived from within the DNA of canonical Rule of Law conceptions; can be identified across canonical conceptions; and, reflect the fundamental needs communicated by each canonical author. In consequence of the way that the elements are derived, satisfaction of both elements is necessary for an account to be considered as being 'Rule of Law-like' regardless of which canonical conception is preferred or considered. Accordingly, should either be absent in the normative commands of a sovereign power or in relation to the operation of a legal system more generally, Rule of Law-like-ness cannot follow. In these terms, the elements' formulation enables the initial and immediate identification of Rule of Law-non-like-ness in *any* idea of the Rule of Law.

Two questions follow. First, why is this important? And, second, why is this important in the context of this thesis? The answer to the first can be

⁵ I explore the nature of the overlap below in *Elements of the Rule of Law: Summary and Objections*.

readily stated. In circumstances where, despite the debate and the lack of any agreed definition of the concept, apex courts across the Common Law world frequently reference the Rule of Law's importance,⁶ and as the level of contestedness seems capable of hindering research and the concept's theoretical application,⁷ bringing clarity to the debate together with ease of application of the concept is vital. The elements derived in this chapter address this problem by providing a new way to evaluate Rule of Law-like ideas through identification—at an early stage and in a theory-agnostic way—of Rule of Law-like ideas that avoids the debate regarding the concept's contestedness that is apparent in the literature.

This is all well and good. But, how about the second question: Why is this important in the context of this thesis? Any attempt to define the—or even a—meaning of the Rule of Law is ambitious and fraught with academic pitfalls. So, why take on such a challenge? The reality is that, despite the potential

⁶ *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)*, 51 UKSC (2017). *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). See also *Bush v. Gore*, 531 U.S. 98 (2000). Regarding the US Supreme Court's interest and focus on the Rule of Law, see Paul Burgess, "[The Rule of Law]" in *the US Supreme Court: the Elephant in the Court Room?*, 8 HAGUE J. RULE LAW 421–428 (2016).

⁷ Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. RULE LAW 48–74, 49 (2010); Ryan E. Carlin & Rodolfo Sarsfield, *Rethinking the Rule of Law: Concepts, Measures, and Theory*, 33 JUSTICE SYST. J. 125–130 (2012).

drawbacks, the endeavour is both useful and necessary. It is useful because it enables both reader and writer to be certain that we are in understanding—if not agreement—as to what is being talked about. This prevents unclarity, ambiguity, and uncertainty creeping in (or being smuggled in) later in the argument. It is necessary because, in circumstances where the wider thesis relates to the differences in the conceptual content of conceptions of the Rule of Law over time—and where the authors of the conceptions explored do not self-identify their ideas with ‘the Rule of Law’ (as the phrase had not been popularised at that stage)—there is a fundamental need to ensure that the theories that will be explored in the two chapters following this one can be sensibly and coherently described as being Rule of Law-like ideas. In this respect, I adopt—both in this chapter and in those that follow—the phrase ‘Rule of Law-like’ to illustrate that the relevant conceptions fall within my definition of the Rule of Law without making the wider assertion that these are conceptions of the Rule of Law in *all* of the ways in which the idea can be conceived. In this sense, I sidestep the debate that reflects the contested nature of the Rule of Law. This is necessary in order to avoid becoming embroiled in the (potentially) endless debates relating to the concept itself. The identification of a conception as being a Rule of Law-like idea is also necessary where the idea of an overarching—objectively correct—concept of the Rule of Law is not accepted. In this situation, the categorisation of ideas—Hobbes’s and Locke’s

ideas in the case of my argument—as Rule of Law ideas could be questioned especially where they are suggested as being impactful or influential on modern Rule of Law ideas. Accordingly, a fine line must be walked; the concept of the cart must not be put before the conception of the horse. By identifying a form of the Rule of Law that exists *beyond* the contestedness that exists in the Rule of Law literature, I create a way to identify Rule of Law-like ideas that does not require either self-identification of the idea by the theorist as a Rule of Law idea, and does not require the acceptance of an objectively correct idea of the concept of the Rule of Law into which thinkers' ideas can be placed. More, however, must be said about my definitional strategy.

In debates regarding the Rule of Law's conceptual content it could be seen as being generally agreed that the concept, whatever else it may be, relates to the imposition of a normative force upon the exercise of power. But this—overly broad generalisation—whilst useful in certain circumstances,⁸

⁸ In subsequent chapters, and notwithstanding the breadth and general charge of potential over-inclusiveness, I will use this idea, in conjunction with the elements, to assist in delineating the extent and nature of Rule of Law-like ideas. In this respect, and as alluded to in Chapter 1, in the chapters in which I seek to identify Hobbes's and Locke's Rule of Law-like ideas, I adopt a working definition of the Rule of Law (to

could be seen as being practically useless for assessing whether a conception is Rule of Law-like. Yet, when the concept's canons' authors' more specific definitions are considered, the contest regarding the concept's content becomes intense. This results in various contests regarding both the concept's application and operation and its content that relate to, *inter alia*, whether the Rule of Law should be applied in an international sphere,⁹ or whether the Rule

identify Rule of Law-like ideas) that is made up of the elements that I identify in this chapter or that is made up of the normative force idea of the Rule of Law. In this respect, I do not use the elements and normative force idea in conjunction with one another to identify the Rule of Law-like ideas. Instead, I use both ideas in parallel in an attempt to cast a wide-net over as many Rule of Law-like ideas as possible. In effect, I use two ways of viewing the idea of the Rule of Law in order to—hopefully—avoid missing anything in the works of Hobbes and Locke that could—sensibly—be conceived of as being a Rule of Law-like idea (whilst avoiding a presentist view of the concept.)

⁹ Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. LAW 331–362 (2008); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT. LAW 315–343 (2011). For a discussion of the way in which the conceptual debate outlined here generally and the international concept of the Rule of Law interact, see Paul Burgess, *Deriving the International Rule of Law: an Unnecessary, Impractical and Unhelpful Exercise*, (FORTHCOMING).

of Law should be construed in formal or substantive terms.¹⁰ (Formal terms relate to the processes of enacting a law;¹¹ substantive terms relate to other considerations including, for example, democracy, liberty, and freedom.)

There are also fine grained debates regarding the concept's content as some suggest a Rule of Law conceptual core exists,¹² others consider it is an essentially contested¹³ or, at least, deeply contested concept.¹⁴ The formulation of

¹⁰ Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC LAW 467-487 (1997). See also BRIAN Z. TAMANAH, ON THE RULE OF LAW HISTORY, POLITICS, THEORY 91 (2004).

¹¹ See, for example, Raz's desiderata: Joseph Raz, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214-219 (2 ed. 2009).

¹² See for example, Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAP. J. LEG. STUD. 232-247 (2012). See also, PRIVATE LAW AND THE RULE OF LAW, 1 (Lisa M Austin & Dennis Klimchuk eds., 2014). Further examples regarding the centrality of arbitrariness and the exercise of power can be seen in Krygier's work: Martin Krygier, *The Rule of Law: Legality, Teleology and Sociology*, in RELOCATING THE RULE OF LAW (Gianluigi Palombella & Neil Walker eds., 2009); Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM (Maurice Adams, Ernst Hirsch Ballin, & Anne Meuwese eds., 2017).

¹³ Waldron, *supra* note 3; Richard H. Fallon Jr., "The Rule of Law" as a Concept in *Constitutional Discourse*, 97 COLUMBIA LAW REV. 1-56, 7 (1997).

¹⁴ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. LAW REV. 781, 781 (1989).

the idea itself is frequently illustrated at the most basic level in the various 'laundry lists' of desiderata. Whilst this practice has become popular,¹⁵ a contest remains as to which list (and criticisms of the same) to adopt. The ideas and conceptions of the usual suspects of the Rule of Law referred to in both Chapters 1 and 2 often conflict and generally overlap. In these circumstances, to assess whether an account is part of the concept of the Rule of Law, one is required to either have recourse to each and every canonical conception; select aspects of one or various ideas; or, alternatively, create a novel Rule of Law conception. However, each method poses a problem. Creating a purpose built Rule of Law conception has the advantage of precisely delimiting the boundaries of the conception, but this is labour intensive and impractical for most projects.¹⁶ Hybrid laundry lists of (relatively) uncontroversial desiderata avoid this impracticality,¹⁷ but they may be criticised for cherry-picking desiderata tailored to support a desired conclusion. For these reasons, and as

¹⁵ A non-exclusive list of protagonists would include: RAZ, *supra* note 11 at 214-219; LON L. FULLER, THE MORALITY OF LAW 46-94 (1964); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. LAW REV. 1 (2008).

¹⁶ This statement remains the case even in relation to a PhD project that is fundamentally aimed at exploring the overarching ideas of conceptual change within the Rule of Law.

¹⁷ See Chesterman, *supra* note 9 at 342-3; Waldron, *supra* note 9 at 316-7. See also Stéphane Beaulac, *An Inquiry into the International Rule of Law*, 14 2007 EUR. UNIV. INST. WORK. PAP. MWP 1-29, 8-11 (2007).

there is no agreement regarding the correctness of any single theory, none of these approaches facilitate a practical solution beyond immediate criticism. In other words, the contestedness means there is no practical and pragmatic way to immediately determine if an action contravenes the Rule of Law in *all* of its most widely cited conceptions or in terms that are not open to immediate criticism. By being conceived at a greater level of abstraction, the Rule of Law elements I identify exist *beyond* the Rule of Law desiderata and the contest regarding these specific aspects of the ideas. In taking this approach—and by focusing on what is common in the goals, and not just the canonical conceptions' desiderata or the similarities in those desiderata—the problems that stem from the concept's contestedness can be avoided and a way to identify non-compliance becomes apparent. In turn, the category that is created can be used to identify aspects of a thinker's thought that can be deemed Rule of Law-like.

My investigation in this chapter is heuristic,¹⁸ with an intent to distil the ends inhering in canonical thinkers' conceptions and not on the intrinsic function the concept of the Rule of Law (as a concept) fulfils.¹⁹ I do not claim to identify what the Rule of Law *is*; as, in consequence of the methodology I adopt, that would necessarily require the canonical conceptions to be accurate statements of what the Rule of Law is. In this respect, whilst describing the Rule of Law in terms of its elements is not new,²⁰ my approach is novel. Two elements can be distilled from the common needs that undergird the most frequently cited canonical conceptions of the Rule of Law. The elements can be defined in these terms:

Comprehension:	That an individual be able to comprehend the nature, content and operation of the rules to which he or she is subject.
Procedural Pellucidity:	The creation and application of any rules must be in terms capable of being clear and obvious to all concerned.

¹⁸ My methodology has much in common Bedner's: Bedner, *supra* note 7. However, the meaning of 'element' differs. Bedner's meaning is in terms of Rule of Law 'basics' or 'principles'.

¹⁹ It is in this respect that the methodology I adopt differs from previously suggested teleological ideas of the Rule of Law. See, for example, Krygier, *supra* note 12; Martin Krygier, *Law as Tradition*, 5 LAW PHILOS. 237 (1986).

²⁰ See, for example, Tamanaha, *supra* note 12 at 232; Bedner, *supra* note 7; CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* 33 (2014).

The elements provide a clear conceptual lens through which to assess whether an account is Rule of Law-like in a way that avoids the concept's contestedness. The failure to satisfy either or both elements is sufficient—but not necessary—for Rule of Law-like-ness to *not* follow. As the failure to satisfy the elements is not a necessary condition of non-Rule of Law-like-ness, this failure is not the *only* way non-like-ness may result. The elements are, however, necessary—but not sufficient—for Rule of Law-like ideas.²¹ By virtue of their necessary location in any Rule of Law-like compliant scheme (regardless of the canonical conception preferred), the elements provide—in relation to the problems referred to above—one way to pragmatically and practically—and without immediate criticism—assess Rule of Law-like-ness. The project could be described as *theoretical Esperanto*:²² bringing together the existing theoretical languages of the various canonical Rule of Law ideas and translating their meaning into a new—derived—theoretical language capable of achieving the same ends as the original language in terms that remain agreeable to all. This process does not outline the only instances of Rule of Law-like-ness—as other

²¹ I thank the anonymous reviewer of my original article for highlighting the importance of clearly stating the full necessary *and* sufficient sides of this equation.

²² I am grateful to Dan Carr of the University of Edinburgh for suggesting a term that so clearly illustrates my conceptual processes.

factors may determine or impact these outcomes—it merely facilitates immediate identification of Rule of Law-like-ness. This small step is useful in addressing the problems outlined above. This process also enables, with a level of conceptual clarity that surpasses the cherry-picking of desiderata or the mere adoption of a single conception of the Rule of Law, the identification and location of an idea as being Rule of Law-like. In considering aspects of a thinker's thought in terms of its satisfaction of these two elements, it is possible to say—where the elements are present—that the idea is a Rule of Law-like idea. I use this theoretical exploration of the Rule of Law in later chapters to identify aspects of Hobbes's and Locke's thought as being Rule of Law-like.

To frame the solution posed in this chapter, I first, in the next part, delineate the boundaries of the study and the nature of the contest relating to the Rule of Law before outlining my methodology in more specific terms. Then, in the next part, I evidence the distillation of the elements from the canonical conceptions. In the penultimate part, I pre-empt some criticisms of the proposed scheme before concluding my argument in the fifth and final part. My aim, by the conclusion of the chapter, is to have a robust, theoretically agnostic, way of identifying Rule of Law-like ideas.

THE RULE OF LAW

There is no real consensus on the form of Rule of Law contest. The ever growing number of conceptions result in varying levels and forms of contest-
edness across the Rule of Law ideas. The variety of ideas has been put in
these terms: ‘... the rule of law may not be a single concept at all; rather, it
may be more accurate to understand the ideal of the rule of law as a set of
ideals connected more by family resemblance than by a unifying conceptual
structure.’²³ What is, nevertheless, clear is that there appears to be an *ongo-*
ing contest between the various Rule of Law ideas; across both time and
place.²⁴ As will already be familiar from the exposition of Common Assump-
tion four in Chapter 2, there are frequent suggestions that the Rule of Law is
deeply contested,²⁵ or even essentially contested (in the Galliean sense).²⁶ In
this chapter, I do not seek to challenge the question of essential contestability
and the Rule of Law, nor do I need to. The distillation of the elements derives
from *beyond* the contestedness—whatever form it may take—to identify a com-

²³ Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS 120–147, 121 (1994).

²⁴ Chesterman, *supra* note 9 at 340.

²⁵ Radin, *supra* note 14 at 781.

²⁶ Waldron, *supra* note 3; Fallon, *supra* note 13 at 7. See Chapter 2: *Assumption Four: The Rule of Law is a Highly (or, even, essentially) Contested Concept*.

monality in the canonical authors' apparent fundamental need. On this approach, the conceptions themselves are not linked and the contest between them—at the level of the conceptions' desiderata—is not, nor does it need to be, resolved.

Formally Framing the Discussion

I adopt only a formal consideration of the Rule of Law. In explaining why this approach is adopted, it is useful to consider F. A. Hayek's definition of the Rule of Law:

[S]tripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.²⁷

Hayek's statement has been described as one of the 'most powerful formulations of the ideal of the rule of law'.²⁸ It is difficult to conceive of a more succinct yet general exposition. Yet, this—formal (or 'thin')—idea could be criticised for excluding any substantive ideas and, relatedly, for failing to

²⁷ FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., 2007).

²⁸ RAZ, *supra* note 11 at 210.

prevent the enactment of evil laws. This arises in relation to the Hart-Fuller debate and, in particular, when interpretations of Fuller's view—that immoral laws should not have legal force²⁹—are considered. However, the use of a formal approach to Rule of Law consideration is not without merit³⁰ as it avoids both the contamination of an examination by substantive considerations³¹ and the muddying of conclusions by the inclusion of additional factors under the Rule of Law umbrella term (as occurs in substantive conceptions).³² Accordingly, in circumstances where the goal is to clearly identify the elements of the Rule of Law, it makes sense to start from a thin base. Further, as formal ideas of the concept provide a foundation for any substantive conception and as the elements I propose are necessary (but not sufficient) components of the formal conception, should the elements not be satisfied in its formal conception, they could not be satisfied in or support any substantive conception. Putting this another way that relates to the way the idea will be used in the

²⁹ Waldron, *supra* note 15 at 18.

³⁰ Charles Sampford, *Reconceiving The Rule of Law for a Globalizing World*, in *GLOBALISATION AND THE RULE OF LAW* 9–31, 19 (Spencer Zifcak ed., 2005).

³¹ See Chesterman, *supra* note 9 at 360.

³² See Craig, *supra* note 10 at 469. (Summarising the argument made by RAZ, *supra* note 11.) In relation to the exclusion of democracy and human rights from Rule of Law ideas, see Tamanaha, *supra* note 12 at 233–236.

wider argument, the inability to identify the elements within a conception results in an inability to classify that conception as a Rule of Law-like idea regardless of whether the target-conception is conceived in formal or substantive terms. For these reasons, a formal conception is enough to address the problem—that, as a result of the contestedness of the concept, there is no practical way to assess when an idea may be a Rule of Law-like idea—raised in this chapter and, further, as is required for the wider argument in the thesis.

Rule of Law Elements

In this section, I suggest it is possible to infer from a canonical author's choice of desiderata, and the author's situation more broadly, the fundamental need that the Rule of Law theory was aimed at addressing. I describe the inference necessary to make the move from canonical Rule of Law laundry lists of desiderata to the elements of Comprehension and Procedural Pellucidity.

Tool analogies are popular in the Rule of Law debate (and in this thesis.³³) After distinguishing one, I will use two to illustrate my point. Joseph Raz,

³³ In this respect, and in addition to this chapter, see Chapter 1.

famously in the Rule of Law context, suggests a knife is only a knife if it has some ability to perform its necessary function: for a knife, an ability to cut.³⁴ Raz considers the various virtues that may exist in relation to the satisfaction of a *particular* end. As the present enquiry considers there may be a number of potential ends, Raz's analogy can only precisely relate if an idea is read into his proposition that there could be a number of other tools able to achieve the same ends: for Raz, cutting. However, in arguing that Margaret Radin's portrayal of Fuller's work as an instrumental conception of the Rule of Law may be mistaken, Jeremy Waldron provides a tool related analogy that does assist. As it is referred to throughout this chapter it is worth extracting in full:

If one wanted to cut down a large tree with an axe, one would have to be sure that the axe was heavy and the head rigid. Heaviness and rigidity in an axe are desiderata for doing things with axes, particularly the things that axes are normally used to do. It does not follow, however, that the heaviness and rigidity of one's tools are general desiderata for cutting down trees. For one might opt to use a two-handed saw—and then maybe lightness and flexibility would be one's instrumental virtues. If the two-handed saw is a better tool than the

³⁴ RAZ, *supra* note 11 at 225–226.

axe for chopping down some tree... then the fact that certain features are desiderata in a good axe does not amount to a general instrumental justification for those features.³⁵

Waldron suggests that ends alone do not justify Rule of Law theories and desiderata alone cannot provide definitive and general justification for the features. Two questions posed by Waldron reflect this: which tool is most efficacious for the goal in mind? and, given the selection of a certain kind of tool, what attributes of that tool best serve the goal?³⁶ These questions do not preclude the inquiry that I propose: that the purpose and intent behind the choice of tool *can* be inferred from the tool's attributes and the context of the situation more generally. Waldron's questions illustrate the structure of any theorist's formulation of a Rule of Law theory would differ based on that theorist's appreciation of the problem. This idea, of course, reflects the solution proposed to the problem that was explored in Chapter 2; I will return to the

³⁵ Jeremy Waldron, *Why Law - Efficacy, Freedom, or Fidelity?*, 13 LAW PHILOS. 259-284, 261-262 (1994).

³⁶ *Id.* at 262. See also RAZ, *supra* note 11 at 225-226.

problem / solution idea at several points throughout the thesis.³⁷ That appreciation would, in turn, impact the selection of the theory scheme (as a tool) and the associated Rule of Law desiderata (as the tool's instrumental virtues). It would follow, where the Rule of Law is contested and a variety of laundry lists of desiderata exist, without knowing any theorist's precise conception of the problem, a direct comparison (of tools or tools' instrumental values) would render the examination subject to the same problem identified by Waldron. In effect, comparing an axe with a saw, or an axe with an axe, or the individual characteristics of both axes and saws in circumstances where the individual theorist's goal has not been identified *in toto*. This reflects, in a basic sense, the problems in the Rule of Law's contestedness. These problems can, however, be avoided by focusing on what is common in the goals—and not just the desiderata or similarities in the desiderata—as each theorist's solution to a particular problem. Together, the abstraction and commonality place any

³⁷ My perspective agrees with Waldron's suggestion that the Rule of Law is a 'solution-concept': Waldron, *supra* note 3 at 158. Chapter 2 has already introduced the idea of a problem / solution based methodology. I expand and apply it to both Hobbes and Locke, in the next two chapters.

distilled element *beyond* the concept's contestedness. By taking this approach, the problems can be avoided.

To say something more about my rationale, expanding the metaphor is useful. Theodore Levitt characterises customers' attendance at a hardware store seeking to purchase a drill bit in these terms: 'People don't want to buy a quarter-inch drill. They want a quarter-inch hole'.³⁸ This sentiment expresses a customer's *need behind the need*. I will call this the *Fundamental Need*.

Here I use 'fundamental' as relating to a necessary base or a core or, alternatively, relating to central importance.³⁹ The use of the definitive '*the* Fundamental Need' needs explanation. It is used despite, as will become apparent below, the potential to abstract further.⁴⁰ It could be argued that abandoning 'Fundamental' or removing the definitive '*the*' may be more appropriate. This would, however, increase ambiguity: it would not be clear which need is being referred to. Accordingly, for clarity, and whilst the potential for further abstraction is recognised, I use 'the Fundamental Need' or 'Fundamental Need' to refer to that which is identifiable as the level of abstracted need capable of

³⁸ Clayton M. Christensen, Scott Cook & Taddy Hall, *Marketing Malpractice: The Cause and the Cure*, 83 HARV. BUS. REV. 74-83, 76 (2005).

³⁹ See, Definition of "fundamental," OXFORD DICTIONARIES | ENGLISH, <https://en.oxforddictionaries.com/definition/fundamental> (last visited Jul 20, 2018).

⁴⁰ See the penultimate part of this chapter: *Why not abstract further?*

being held *in common* across conceptions. This represents, in effect, the point at which maximum practical and pragmatic benefit is obtained.

Whilst Levitt's business / marketing concept is far removed from legal theory, it can be directly applied to the task at hand. Statements of commonality in canonical desiderata merely express a potential solution to an initial need (but not the Fundamental Need). They reflect a way to solve a problem and not an expression of the problem itself. This will, therefore, not provide a useful comparison as the desiderata alone will amount to no more than the identification of a commonality of functional or instrumental approach or process. Bedner's suggestion that it will be impossible to find a definition pleasing to all as any common ground for the ideas of the Rule of Law is thin⁴¹ is undoubtedly true unless a mere aesthetic of commonality is sought; for example, through basic similarities like the preponderance of calls for 'predictability'. However, exposing a common background purpose as a Fundamental Need would be meaningful. This would allow superficially similar surface expressions to be disambiguated and different surface expressions could be

⁴¹ Bedner, *supra* note 7 at 53.

separately aggregated.⁴² Identification of a common Fundamental Need in canonical Rule of Law conceptions would represent an element—common to all ideas—of the Rule of Law that exists *beyond* the concept's contestation.

The common elements—that reflect the Fundamental Need—can be identified through the inference of intent or purpose: the common sharpness of both an axe and saw, when combined with the general nature and possible applications of those tools, suggests the goal is cutting; or, more specifically, cutting wood. From two individuals' selection of these two different tools, an open inference is that they both wish to cut wood. This is the—commonly held—Fundamental Need (as expressed through their individual tool selection). Rule of Law elements can be identified in the same way. By considering a canonical author's formulation of a Rule of Law conception, the end to which the conception is directed can be inferred. This represents *that* thinker's Fundamental Need. Commonality across the Fundamental Needs of each canonical author provides the basis for the identification of the elements

⁴² Further to this point, the disambiguation of various Rule of Law desiderata and conceptions' characteristics reflects a function of the application of the problem / solution methodology in the next two chapters. The disambiguation of common terms, thus, can be seen to be an essential part of both identifying the nature of conceptions of the Rule of Law as well as the identification of conceptions of the Rule of Law themselves.

of the Rule of Law. As already noted, I do not intend to suggest that the Fundamental Need represents the *most* basic, or absolute, need that can be inferred from the conceptions contained in the Rule of Law canons. Cutting wood is not the only need that may be inferred from the tool's selection; a more abstract need would be to make firewood or to generate heat (from burning the cut wood). In taking this further abstracted step any *commonality* of purpose may, however, be lost.⁴³ With commonality as the key ingredient in the Fundamental Need, the Rule of Law elements only—and specifically—reflect the *commonly* held Fundamental Need. By virtue of the elements being derived in this way, the elements—as a reflection of the Fundamental Need—are necessary for Rule of Law-like-ness across all Rule of Law canonical conceptions.

In taking a small step back, a basic question remains. *How* can we identify the Fundamental Need? When taken with theorists' stated goals, Rule of Law desiderata will inform the Fundamental Need. Rule of Law desiderata are useful as signposts of the theorists' intent; eschewing the relevance of these would be to throw the baby out with the bathwater as they are an em-

⁴³ I consider the question of *additional* abstraction in *Why not Abstract Further?*, below.

bodiment of the theorists' solution to a problem and are, therefore, suggestive of the ultimate goal: the selection of an axe *or* saw (that each have sharpness as a characteristic) rather than a hammer (with dullness as a characteristic) suggests the goal is cutting rather than striking. However, it is only in considering a tool's characteristics *in conjunction* with the general nature of its circumstantial uses that the purpose—of cutting wood in this example—can be inferred. Accordingly, holistic consideration of canonical theories *and* desiderata will be apposite.

To avoid simply re-stating the broad rationale for the existence of the Rule of Law, and to provide some analytical benefit, the Fundamental Need must be a more specific ideal than the mere avoidance of arbitrary power or the limitation of government interference. Whilst I argue the two elements identified in the following part express the Fundamental Need, I do not suggest this is the only way in which this may be conceived; again, I am not suggesting the *only* purpose to be inferred from an axe or tool's sharpness is cutting wood. Whilst I will return to this point later, it suffices to say simply that cutting wood *is* an inference that can be made and, crucially, it is one that *is* common across the considered uses. For the validity of my argument, any further claim to exclusivity of purpose is unnecessary.

DISTILLING THE ELEMENTS

In this part, I survey canonical conceptions of the Rule of Law to identify the elements defined in the opening pages of this chapter: Comprehension and Procedural Pellucidity. As simply listing the canonical Rule of Law conceptions in attempting to distil the elements would be uninteresting and unhelpful, I propose each element and support that element's existence through recourse to any relevant canonical conceptions.

Comprehension as an Element of the Rule of Law

Comprehension⁴⁴ as an element of the Rule of Law requires that an individual be able to comprehend the nature, content, and operation of the rules to which he or she is subject. Two aspects are encompassed in this formulation: that an individual must, first, receive and, second, process rules as part of an endeavour shared with another individual or entity. This reflects the two components of the dictionary definition: first, the ability to understand

⁴⁴ Hereinafter 'Comprehension' (with a capital 'C') refers to the element of the Rule of Law.

something⁴⁵ or the faculty of grasping with the mind and the capacity to understand fully;⁴⁶ and, second, the capability of including or inclusion.⁴⁷

General communication can be used to evidence the way in which Comprehension is an element of the Rule of Law. The necessity of comprehension (in communication generally) has an obvious synonymy with canonical conceptions of the Rule of Law and their associated Rule of Law desiderata. Communicating through writing and speech includes fundamental prerequisites to understanding and, therefore, comprehension. For example, parties must adhere to the same rules. This includes the adoption and acceptance of common meanings of words and phrases within the chosen language and the mutual agreement to communicate in the same language (or at least in a way that both parties know can be understood by the other). Furthermore, parties must know in advance that each will continue to conform to these rules. In effect, there must be a practical ability to *understand* the form of the communication. There will not, for example, be actual communication

⁴⁵ Definition of "Comprehension," OXFORD DICTIONARIES | ENGLISH, <https://en.oxforddictionaries.com/definition/comprehension> (last visited Jul 20, 2018).

⁴⁶ Definition of "Comprehension," MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/comprehension> (last visited Jul 20, 2018).

⁴⁷ *Id.*; Definition of "Comprehension", *supra* note 45.

in the broad sense, never mind comprehension, on the expression of a sentiment out of the earshot of the other party or if it follows a structure that makes no grammatical sense. These final categories are vital, as adherence to all of the other requirements would not, otherwise, facilitate comprehension. This suggests comprehension generally requires *more* than the exchange of propositions and the processing of an *external* input. It requires that there be a level of understanding or appreciation of what and how information is being, and will be, communicated. It also requires *internal* processing of a proposition through adherence to a set of commonly known and understood norms of conduct that assist the internal act of processing, and the formation and structuring of the appropriate outputs.

Comprehension, as a Rule of Law element, reflects these internal and external aspects. *Both* must be satisfied to facilitate Comprehension. The *internal* aspect—which I outline in more detail shortly—relates to an individual's ability to understand the nature, content, and operation of the rules to which he or she is subject. The *external* aspect relates to the way in which the party receives or becomes aware of various norms. These can be simply stated by listing some of the obvious expressions of relevant Rule of Law conceptions'

desiderata that include calls for clarity,⁴⁸ consistency or congruence,⁴⁹ freedom from contradiction,⁵⁰ or communication/promulgation.⁵¹ These relate to facets of norm formation external to an individual's control; in other words, they relate to the creation and packaging of a norm *before* it is received by the individual.

Comprehension as the Fundamental Need behind these requirements provides a realistic expression of the purpose common in each of these canonical statements. A party's (internal) awareness of rules facilitates Comprehension of both the existence and application of the rule as well as the rule's relevance to the party. The fact that there must be rules and they must be general appears to be the least controversial of all Rule of Law desiderata.

⁴⁸ RAZ, *supra* note 11 at 214-5; FULLER, *supra* note 15 at 63.

⁴⁹ FULLER, *supra* note 15 at 81.

⁵⁰ *Id.* at 65.

⁵¹ Regarding the requirement that rules be announced beforehand: *Id.* at 49.; HAYEK, *supra* note 27 at 112. Regarding the requirement that an individual have an awareness of the laws of the state in order to modify one's action: FRIEDRICH A. VON HAYEK, *THE CONSTITUTION OF LIBERTY* 210 (1960); Solum, *supra* note 23 at 122; NOEL MALCOLM, *THOMAS HOBBS: LEVIATHAN* 26 (2012).

Fuller includes this as his first requirement;⁵² it is also a requisite in formulations by Raz,⁵³ Solum,⁵⁴ and Hayek.⁵⁵ A requirement for rules by way of written, albeit potentially changeable, laws expressed in general terms has also been stated as being fundamental to the classical conceptions of the Rule of Law.⁵⁶ For Radin, this requirement formed the first of two basic principles of the Rule of Law.⁵⁷ Dicey's Rule of Law also reflects the requirement that there be rules and that they be in general terms applicable to all.⁵⁸ Whilst both striking and interesting, mere similarity of expression achieves and reveals little; this represents only the commonality of desiderata referred to in the previous part. Comprehension—as a requirement that an individual be able to comprehend the nature, content, and operation of the rules to which he or she is subject—is also evidenced across these ideas related to generality

⁵² As the principle of 'Generality', see FULLER, *supra* note 15 at 46.

⁵³ RAZ, *supra* note 11 at 213 and 216.

⁵⁴ Solum, *supra* note 23 at 122.

⁵⁵ HAYEK, *supra* note 27. See also HAYEK, *supra* note 51 at 218-219.

⁵⁶ For the often cited statements of Aristotle, see ARISTOTLE, T. SINCLAIR & TREVOR J. SAUNDERS, THE POLITICS 1285b33, 1287a23 (1981).

⁵⁷ Radin, *supra* note 14 at 785.

⁵⁸ A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-203 (10 ed. 1979).

as individuals must understand that rules properly made and expressed in general terms will undoubtedly apply to him or her.⁵⁹

Predictability, stability and constancy are also frequently included within canonical Rule of Law formulations.⁶⁰ When considered in *prima facie* terms they simply represent one small bundle of virtues that, notwithstanding their frequent invocation, relate to one way of achieving a goal in a particular Rule of Law theory; an idea that is akin to the sharpness of a saw or heaviness of an axe. The reflection of the Fundamental Need in these desiderata becomes apparent when we conceive the desiderata as requiring an individual to know the rules he or she is subject to in advance, and to expect they will re-

⁵⁹ See Jeremy Waldron, *Principles of Legislation*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 15–32, 21 (Richard W. Bauman & Tsvi Kahana eds., 2006).

⁶⁰ See for example, ARISTOTLE, SINCLAIR, AND SAUNDERS, *supra* note 56; RAZ, *supra* note 11 at 215; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 350–352 (Peter Laslett ed., Student ed. 1988); FULLER, *supra* note 15 at 79; HAYEK, *supra* note 27 at 114; HAYEK, *supra* note 51 at 210. However, Hayek's views in relation to the operation, but not the necessity, of predictability later changed: FRIEDRICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 115–8 (1979).

main in force in the form in which they currently exist. Both relate to the parties' background understanding and beliefs. In this way, these desiderata are of similar effect to the common desideratum that stipulates the necessity for prospective laws and rules.⁶¹ These desiderata are individually and collectively aimed at ensuring parties are put in a position to know, understand and trust the continued operation of the rules and are able to predict, with some degree of certainty and confidence, the rules that will result in the imposition of sanctions. Raz puts it this way:

The violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and disappointed expectations. It leads to the first when the law does not enable people to foresee future developments or to form definite expectations...⁶²

The internal processing of information by (and the external transmission to) a party are represented by the need described by Radin and Fuller in relation to *knowable* desiderata. For Radin, the requirement of 'knowability'

⁶¹ See for example, FULLER, *supra* note 15 at 51; RAZ, *supra* note 11 at 214; HAYEK, *supra* note 27 at 112; LOCKE, *supra* note 60 at 353; HAYEK, *supra* note 51 at 210.

⁶² RAZ, *supra* note 11 at 222.

included requirements that rules be public, congruent, non-contradictory, clear, and relatively stable.⁶³ Fuller too prefaces various aspects of his Rule of Law conception with a necessary requirement for knowledge:

This lies in a quality shared by both, namely, that they act by *known* rule. The internal morality of the law demands that there be rules, that they be made *known*, and that they be observed in practice by those charged with their administration. These demands may seem ethically neutral so far as the external aims of law are concerned. Yet, just as law is a precondition for good law, so acting by *known* rule is a precondition for any meaningful appraisal of the justice of law. "A lawless unlimited power" expressing itself solely in unpredictable and patternless interventions in human affairs could be said to be unjust only in the sense that it does not act by *known* rule.⁶⁴

Radin also considers the 'perform-ability' of desiderata as being in a separate, albeit related, category to know-ability.⁶⁵ This approach is not incorporated—save by implication—into the concept of Comprehension. Explicit inclusion of any impossibility desideratum within Comprehension is not required. The idea that a law or rule is required to be capable of performance

⁶³ Radin, *supra* note 14 at 786.

⁶⁴ FULLER, *supra* note 15 at 157–8 (emphasis added).

⁶⁵ Radin, *supra* note 14 at 786.

could be associated with a party's Comprehension *only* in terms where the party is capable of compliance in any event: a law that requires the impossible would be no law.⁶⁶ In these terms, Comprehension (in broad terms) also incorporates—in addition to the purposive intent included in the other desiderata outlined above—the requirement that a law must be performable or, at least, not impossible.

Procedural Pellucidity as an Element of the Rule of Law

The second Rule of Law element—Procedural Pellucidity—requires the creation and application of any rules to be in terms capable of being clear and obvious to all concerned. In this regard, the process must be transparent and clear, affected in a careful and determined way following a process of evaluation, and the resulting norms and decisions must be expressed clearly by the decision maker (as the norm creator or applier). As Jeremy Waldron has recently been the most outspoken and visible advocate for the inclusion of procedural aspects into the Rule of Law, and as his statements closely relate to Procedural Pellucidity, I explore his work in some detail in this section.

⁶⁶ FULLER, *supra* note 15 at 70.

I begin, however, with some boundary setting. In reflecting the Fundamental Need behind the various canonical conceptions of the Rule of Law, Procedural Pellucidity has two prongs. Any decision or decision-maker must clearly and apparently demonstrate both. These prongs require that, first, a decision-maker consider various issues and, second, there be clear communication of the resultant decision. Procedural Pellucidity may apply to any rule-maker or decision-maker (whether a judge, legislator, or any other power wielding decision-making agent of the government).⁶⁷ A further instance of boundary setting is also required. The definition of Procedural Pellucidity, suggests an overlap between the second prong of Procedural Pellucidity—that there be clear communication of a decision—and the aspect of Comprehension that requires an individual to be able to comprehend the nature, content, and operation of the rules. Although the overlap is not fatal—or even problematic in the terms of this assessment or the formulation of the elemental scheme generally—in the hope that the existence of Procedural Pellucidity can initially be considered on its own merits, I defer discussion of the overlap until the next part.

⁶⁷ This is not to rule out the potential operation of the Rule of Law in private law. See PRIVATE LAW AND THE RULE OF LAW, *supra* note 12 at 1.

The first prong—that a decision-maker consider various issues—is apparent across canonical conceptions. Whilst procedural values have recently gained wide acceptance following the inclusion—either directly or by implication—of procedural components in conceptions by, *inter alia*, Lon Fuller, Joseph Raz, and Jeremy Waldron,⁶⁸ the concept is not new. Aristotle, by way of decrying the making of hasty and emotion-fuelled decisions, refers to the requirement for the inclusion of some form of (what would now be deemed) legislative due process.⁶⁹ Whilst care should be taken in interpreting Aristotle's comments in the modern Western tradition, it is apparent there is some call for a level of 'cool headedness' and the avoidance of impassioned decision making. Dicey famously propounded a similar due process requirement through the sentiment that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.⁷⁰ Whilst this view has not escaped criticism,⁷¹ and although his insistence on the courts

⁶⁸ See n 77 below and accompanying text. See also, RAZ, *supra* note 11 at 214–217.

⁶⁹ ARISTOTLE, RHETORIC 1 ch 1 (W. Rhys Roberts tran., 2004).

⁷⁰ DICEY, *supra* note 58 at 188.

⁷¹ See for example, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY. 35 (1969).

alone as an enforcement mechanism may have been short-sighted, it is apparent the conception is formal⁷² and the broad aim is clearly procedural.

Ronald Cass concludes that '[a]dherence to the rule of law slows down changes in the system, increases the foreseeability of change, makes change less the product of one individual's will than of the more regularized and intricate interweaving of different wills and priorities.'⁷³ Cass Sunstein also imports a similar function together with requirements for: the separation of law-making and adjudicative processes and minimal due process requirements; hearing rights and availability of review by independent adjudicative officials; a separation between law-making and law-implementation; and the prevention of rapid changes in laws' content.⁷⁴ Raz's laundry list of desiderata echoes this common procedural function by requiring that the *making* of laws be guided by clear and transparent rules and that natural justice is to be observed within

⁷² Craig, *supra* note 10 at 470. (Here, 'formal' is used in a sense opposite to substantial and not in the more limited sense as relating solely to the way in which a law is made.)

⁷³ Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS, 226 (Enrico Colombatto ed., 2004).

⁷⁴ Cass R. Sunstein, *Rules and Rulelessness*, (Program in Law & Economics Working Paper No. 27) 1-72, 15-6 (1994).

courts that are easily accessible.⁷⁵ Waldron, following a consideration of the Diceyan approach, concludes that of '[t]he legislature, the judiciary, and the executive--each must have its separate say before power impacts on the individual.'⁷⁶ He also identifies procedural elements in the work of Raz and Dicey and a procedural component to the work of E. P. Thompson.⁷⁷ Fuller's conception, Waldron suggests, 'has to do with legislative form, not judicial procedure...'⁷⁸ and, augmentation of Fuller's desiderata with a further extensive set of procedural requirements is necessary else we 'radically sell short the idea of the Rule of Law'.⁷⁹

Waldron also advocates procedural ideas--legislative and judicial--in his own work. In relation to legislative law making, he suggests a list of procedural principles of legislation that require, inter alia, disagreement must be allowed, a forum must give voice and general consideration to issues raised, deliberation and debate be engaged in, and due care must be taken.⁸⁰ The

⁷⁵ RAZ, *supra* note 11 at 214-217.

⁷⁶ Jeremy Waldron, *Separation of Powers in Thought and Practice*, BOSTON COLL. LAW REV. 433, 459 (2013).

⁷⁷ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW 3-31, 10-11 (James E. Fleming ed., 2011).

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 6-7.

⁸⁰ Waldron, *supra* note 59 at 18.

distinction here appears to be one between formal in a narrow sense (relating only to the rules regarding making a law) and the process of applying the law; Waldron accords procedure only the narrow interpretation. (Although *procedural* is conceived of in a slightly broader context in the present investigation, there seems to be little that ultimately turns on this differentiation.) One reading of Waldron's desiderata could be restricted to the operation of a hearing before some form of tribunal. On this—more restrictive—interpretation, the desiderata largely reflect a list of due process requirements. This appears to be conceded in a later piece where he states '[t]he point is that there is very little about due process or courtroom procedure in Fuller's account of law's internal morality...'⁸¹ The other desiderata suggested by Waldron, also largely relate to the narrowly defined requirements of due process.⁸² In this respect, it is no surprise that Waldron's conception of procedure is narrower than that representing the Fundamental Need encompassed by Procedural Pellucidity. Waldron has also suggested a wider interpretation. It is not enough, he says,

⁸¹ Waldron, *supra* note 77 at 8.

⁸² *Id.* at 6. (These include: rights to a hearing before a trained judicial officer; to legal representation; to present evidence and arguments; to confront witnesses; and, to be present at critical stages of the proceeding.)

to simply state 'plaintiff wins', as satisfaction of the Rule of Law may require articulation of exactly why that party has won; and this could extend to the existence of a right to reasons for a decision.⁸³ These aspects are reflected in Procedural Pellucidity as satisfaction requires there to be clear communication of reasons for any decision and that there must be consideration of the arguments presented. Where the idea of procedure is being applied to the wider process of law making—relating to the conduct of all wings of the government referred to by both Dicey and Waldron⁸⁴—it is not anticipated that the meaning and description of 'procedural' will be stretching the concept too far. Each of these ideas of the Rule of Law suggest a commonality of purpose that requires there to be careful, and obvious, consideration of decisions during decision-making or in affecting rules. These are reflected in the first prong of Procedural Pellucidity.

The second aspect—that there be communication of any decision—can be very briefly stated. This is both explicitly part of the various procedural conceptions already noted as well as a necessary implication in circumstances

⁸³ *Id.* at 6.; Jeremy Waldron, *Stare Decisis and the Rule of Law: a Layered Approach*, 111 MICH. LAW REV. 1, 17 (2011).

⁸⁴ See n 70 and 76 above.

where, as has already been demonstrated, there is a frequently stated requirement for the Rule of Law to be promulgated.⁸⁵

As will be apparent from the exploration of these procedural ideas of the Rule of Law, there is a requirement that there be clarity in both processes of evaluation and determination and in the expression of those norms. This brief review suggests Procedural Pellucidity as a reflection of the Fundamental Need—that the creation and application of any rules must be in terms capable of being clear and obvious to all concerned—is held in common across and can be inferred from the various canonical conceptions of the Rule of Law.

ELEMENTS OF THE RULE OF LAW: SUMMARY AND OBJECTIONS

Through their ready identification within—or at least behind—the canonical conceptions referred to above, Comprehension and Procedural Pellucidity are elements of the Rule of Law that—given the theoretically agnostic process of distillation and their reflection of the Fundamental Need expressed in canonical conceptions—provide a way to identify Rule of Law-like ideas regardless of the canonical conception preferred. In addition, and as outlined

⁸⁵ See n 51 above and associated text.

below, they can also provide a way to identify Rule of Law-like ideas in a way that avoids many of the criticisms associated with various other methodologies. Where Comprehension and Procedural Pellucidity (respectively) require an individual to be able to comprehend the nature, content, and operation of the rules to which he or she is subject, and require the creation and application of any rules to be in terms capable of being clear and obvious to all concerned, it is apparent that both processes and outcome are critical to Rule of Law-like-ness. By way of a quick 'sense check', this does not immediately contradict popular or intuitive ideas of what the Rule of Law is. In this respect, the elements provide a pragmatic solution to the problems highlighted at the start of this chapter. They enable identification of whether a thinker's theory is capable of being considered as Rule of Law-like without having recourse to each conception individually, having to select a hybrid model, or having to formulate a novel Rule of Law conception. Furthermore, given the way in which the elements have been identified—as a reflection of the commonly held Fundamental Need across canonical conceptions—they exist *beyond* the concept's current state of contestedness. Before I illustrate exactly how these derived elements can be used in the context of this thesis, I attempt to preempt some objections, by posing and briefly answering five questions.

Can the Elements Unify the Conceptions / Remedy the Contestedness?

Given the contestedness of the Rule of Law—and if it is correct that the Rule of Law is, as is widely accepted to be the case, an essentially contested concept—wouldn't the existence of any element (as defined herein) be a misnomer and an irrelevance as there can be no such unifying principle between conceptions?⁸⁶ Should it be asserted that Comprehension and Procedural Pellucidity operate as a direct bridge between various conceptions this objection could not be denied. However, that is not the claim. Should that be the claim, it would be like stating an axe is actually a saw. Or, more specifically, like stating that an axe can be conceived of as being conceptually and fundamentally a saw simply by virtue of the purpose to which the tool is being put. Care has been taken to avoid this position. The elements proposed reflect a common Fundamental Need. This need does not bridge between conceptions—or even the contest between them—but, instead, looks to the purposive intent *behind* the conceptions. The connection is one of purpose alone; as

⁸⁶ This question could be considered as making a straw man out of Gallie's idea of essential contestability. I do not take issue with that suggestion. However, I retain the question as an objection as it usefully highlights the operation of the elemental scheme as the objection could also be raised absent essential contestability.

the purpose is the Fundamental Need that the canonical author seeks to address by providing his / her Rule of Law conception as a solution to a problem. In terms of the axe / saw analogy, these are tools useful in the act of cutting down a tree. This is not to suggest these are the sole uses for either tool or that they are the only tool for the job; after all, a saw can also be used for cutting timber or as a musical instrument, and an axe can be utilised as a weapon of war or be used—perhaps, by either a fire fighter or Jack Nicholson’s character in the *Shining*—to gain access to a locked room. For these reasons, identification of the Fundamental Need does not suggest the elements provide a unifying theory of the Rule of Law. In fact, the suggestion is precisely that the elements—by simply indicating commonality of purpose—avoid having to determine or state these things. Further, as the elements exist at a state of abstraction removed from the plane on which the contest currently takes place, the contest—whether properly characterised as being essentially contested or not—cannot directly be solved through the proposed methodology. As already noted, I aim only to solve the problems outlined at the start of this chapter by going beyond the contest itself.

Does the Overlap Between the Elements Result in a Problem?

The cohabitation of the same conceptual terrain by the two elements does not represent a conflict in the true sense of the word, as the elements' operation is not exclusive. As alluded to already, both processes and outcomes are crucial to Rule of Law-like status. The two elements exist on a single spectrum flowing between processes and outcomes. Procedural Pellucidity is exclusively situated at the processes end of the spectrum as a consequence of its role in the making of norms; Comprehension exclusively occupies the outcomes end of the spectrum as a result of its relation to the internal processing of information (provided by the norms). In the middle, is the 'overlap' where there is a dual concern between the elements regarding the expression or communication of norms. This 'overlap', however, does not result in a mixing of the elements' function. The two elements relate to different sources: Procedural Pellucidity to norm-makers and appliers; and Comprehension to norm-followers. It is due to this exclusivity of source application that the two elements cannot, and should not, be collapsed together.

What would it mean if an action facilitates Comprehension but not Procedural Pellucidity (or vice versa)? The answer is deceptively straightforward: non-satisfaction of either one of the elements means Rule of Law-like status does not follow and neither does the identification of an idea as being a Rule

of Law-like idea. This result obtains as both elements are necessary (but not sufficient) elements of the Rule of Law conceptions. Although a small area of 'overlap' may exist, neither element covers the entire field. An action that supports only one element would leave a substantial necessary area of the Rule of Law unsatisfied. It is only *together* that the elements facilitate Rule of Law-like ideas; non-satisfaction of either element *is* sufficient to result in Rule of Law non-likeness; the absence of either precludes an idea being conceived as a Rule of Law-like idea.

Why not Abstract Further?

Further abstraction is, of course, possible. However, in considering two instances of further abstraction, abstracting *beyond* the Fundamental Need results in a loss of pragmatic benefits or practical application of the elemental scheme. In other words, altering the level of abstraction—in either direction from the Fundamental Need—can result in a less desirable solution to the problems outlined at the start of this chapter. In this respect, the line in the sand drawn by the elements I propose represents an attempt to achieve the maximum pragmatic benefit.

The first instance of further abstraction beyond the Fundamental Need has already been mentioned above. This would—in tool related terms—suggest the purpose to be inferred from the use of an axe is firewood or heat, and not merely cutting down a tree. To accurately abstract to each canonical author’s specific goal would require a complete appreciation of the precise intentions and motivations resulting in the formulation of the Rule of Law conception. Even if an exhaustive study of each canonical author were undertaken, the result would remain speculative. The less abstract the inference—and the closer to the conception communicated in the canons—the less speculation is required. In addition, as each author’s ultimate aim may have differed slightly as a result of each conceiving of the problem in slightly different terms, it seems likely that a divergence in those goals would occur when *further* abstraction is considered. Accordingly, consideration of the more abstract goal makes convergence and commonality of purpose less likely to be achieved or identified. For these reasons, attempts to divine a *more* abstract purpose appears to be both impractical and fruitless.

There is a second, and different, instance of abstraction. Couching a general conception of the elemental content of the Rule of Law in more abstract terms is possible via recourse to the, largely uncontroversial, overly broad idea of the Rule of Law referred to at the start of this chapter: that the

Rule of Law is nothing more than some level of normative force that acts on a rule-maker in a way that, ultimately, prevents the exercise of arbitrary power.⁸⁷ At some stage along the continuum of abstraction toward this 'ultimate' position, the act of abstraction itself becomes pointless; the level of abstraction results in the idea becoming, in practical terms, devoid of meaning. Of course, the same result obtains in the opposite circumstance: abstracting less results in the non-avoidance of the instant issue of contestedness and, hence, the assessment would provide no benefit. For all of these reasons, a line in the sand is required. The intention behind the line-placement suggested by the elemental conception proposed herein seeks to bisect the problems raised by the titular questions posed below—*Are there pragmatic benefits?* and, *Why not use another conception?*—and the concept's general state of contestedness.

⁸⁷ As will be seen in the subsequent chapters, consideration and, to some degree, application of this form of conceptual identification / definition does—notwithstanding the criticism here—remain. Its retention, whilst providing a relatively familiar position to those familiar with the Rule of Law literature, does not dull the criticism.

Are there any Real Pragmatic Benefits?

In order to evidence the elements' utility as identifiers of Rule of Law-like ideas in the remainder of this thesis, I provide two brief examples to illustrate that the elements—though abstract—do still provide pragmatic benefits. The elements are necessarily more abstract than the conceptions from which they are distilled, but they are not so broad as to be irreconcilable with any Rule of Law-relevant example.

There is little doubt that aspects of the Nazi regime would not pass the elemental Rule of Law muster. In considering the Roehm Purge⁸⁸ it is clear there would be a complete failure of Procedural Pellucidity. This means the events and actions could not be said to satisfy the Rule of Law in any canonical conception. However, this extreme example alone provides little benefit regarding the location of the metaphorical line in the sand. If the elemental

⁸⁸ The Roehm Purge occurred when Hitler ordered, and retroactively authorised, mass murders before stating that the court of Germany had consisted of himself. See Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. LAW REV. 630–672, 650–2 (1958).

scheme is to have *any* value it must at least have some potential in determining, or, at least, not excluding, the 'hard' cases. A second example that is intuitively more ambiguous will assist. An Australian Prime Minister announced the next sitting parliament would retrospectively criminalise a particular act from the date of the announcement.⁸⁹ The making of the announcement arguably—in some conceptions of the Rule of Law—may negate the retrospectivity that would ordinarily be fatal (in criminal matters). Of the various conceptions that vehemently oppose retrospectivity, Fuller's is one of the best known: 'Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly a monstrosity.'⁹⁰ Although space does not afford opportunity to provide a detailed examination regarding the elements, a cursory consideration suggests two issues of note. First, the Prime Minister's announcement may be able to obviate invalidity

⁸⁹ This example has previously been applied by Waldron. See Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?*, 10 OTAGO LAW REV. 631–654, 634–636 (2004). The act in question related to the making of hoax threats of Anthrax having been posted to institutions. Although Waldron uses the example to differentiate retroactive and retrospective legislation, the illustration works equally well here.

⁹⁰ FULLER, *supra* note 15 at 53.

due to retrospectivity as Comprehension *may* be facilitated through the manner, nature, and content of the announcement (notwithstanding the specific legislative steps necessary to criminalise an act).⁹¹ Procedural Pellucidity would substantially be satisfied on the passing of the Act in the normal course of parliamentary procedures. But, it seems, there would be no Rule of Law-like-ness at the point of the announcement; this is only achieved through the two acts separated in time. However, and this is the second point, it is not immediately apparent there is a slam-dunk answer as there remains some wiggle room in relation to the application and precise terms of the internal and external operation of Comprehension in the given example.

These examples—in circumstances where the elemental scheme is intended only to operate as a shorthand way to identify Rule of Law *non*-like-ness and to flag instances of Rule of Law-like ideas—suggest the line in the sand is in a position that retains some analytic value and does not create a category that is either too broad to be devoid of purpose or too narrow so as to exclude any potential application; in this sense, in the second of these two functions, the idea can be seen to be capable of culling some wheat from the chaff. The elemental scheme can be seen to be doing some work in two

⁹¹ Putting aside the obvious issue that the mere words of a Prime Minister are not constitutive of a legally binding norm.

senses: first, it disposes of the relatively clear Nazi example; and second, it leaves open the somewhat ambiguous example for further examination. On this basis, the line in the sand appears to be in broadly the right place for the immediate identification of non-Rule of Law-like-ness. In other words, the scheme is able to provide the pragmatic benefit of being able to rapidly and easily determine an instance of non-Rule of Law-like-ness without having recourse to all canonical conceptions separately *and* it is capable of providing a way to distinguish one form of (non-Rule of Law-like) idea from another Rule of Law-like idea. Furthermore, the theoretical agnosticism inherent in this approach results in the ability to draw both a more robust conclusion to any analysis and to distinguish and differentiate ideas that are Rule of Law-relevant from those that are not.

Why not use an Existing Conception?

The immediate response to this question harks back to the issues posed earlier in the chapter: in terms where the content of the Rule of Law is not settled, adoption of a single or hybrid methodology is open to immediate criticism. However, the question could also relate to the criticism of the use of the elemental scheme in a way that supplants existing canonical Rule of Law conceptions. Should this be the thrust of the question, the response is that

there does *still* remain a need to use the existing canonical conceptions. I am not suggesting the elemental conception supplants, replaces, or is superior to those conceptions. Indeed, that cannot be the case where the elements—as necessary and not sufficient aspects of the Rule of Law—are limited to identifying only *non*-like-ness or are used in order to identify Rule of Law-like ideas that include various canonical conceptions.

CONCLUSION

I have argued two elements of the Rule of Law can be distilled from canonical Rule of Law conceptions and that these provide a theory agnostic way to identify Rule of Law-like ideas. It is in relation to this second function that the ideas contained in this chapter will be principally applied in this thesis. The Fundamental Need behind Rule of Law canonical conceptions represents a commonality of thinkers' purpose and this commonality is reflected in the elements. The two necessary Rule of Law elements (although there may be more) can be used to identify Rule of Law-like ideas in a way that satisfies all canonical conceptions and does not put the conceptual cart before the conceptions' horse; in short, by taking this approach, it is possible to generate a general idea of 'the Rule of Law' concept—that agrees fundamentally with all of the conceptions that are accepted as being 'canonical'—in a way that avoids the many, varied, and valid criticisms associated with the identification of a

meaning of the concept in circumstances where the very idea is so deeply contested. This approach avoids the problems and criticisms associated with the adoption of part or all of one or many canonical conceptions or the logistical impracticability associated with the generation of a bespoke complete Rule of Law theory. In this way, the elemental approach facilitates a robust and practical methodology for identifying Rule of Law-like ideas that can be used in the remainder of this thesis.

CHAPTER 4:

THE LEVIATHAN'S RULE OF LAW:

HOBBS'S SOLUTION TO THE PAMPHLETEERS' PROBLEM

INTRODUCTION

In the Rule of Law debate, historical authors' texts are frequently cited to illustrate what the concept *is*. However, as little more than a caricature of these usual suspects' conceptions is generally adopted, this use leads to the well-known conceptual contest that is based on a broad yet relatively superficial assessment of the accounts' disagreement. In this chapter, by examining one—frequently caricatured—account, and by suggesting we can only properly understand a Rule of Law-solution if we understand the correlative Rule of Law-problem, I consider *exactly* what Hobbes was doing in positing his Rule of Law-solution in *Leviathan*. In doing this, I change the focus of my argument from a theoretical exploration to a practical application of the theoretical ideas explored thus far. The aim of this chapter is to clearly identify the Rule of Law-like idea that was provided by Hobbes and, in doing so, differentiate it from the caricature that is generally taken to exist. (This process is replicated in Chapter 5 with the focus on Locke.) I take the aspects

of Hobbes's thought in *Leviathan* that can—in accordance with my argument in Chapter 3—be considered as being Rule of Law-like ideas, and consider them in the context of their authoring in order to obtain a clearer idea of their meaning and implications on the contemporary Rule of Law ideas that they influence. In accordance with my conclusion in Chapter 2, I contextualise Hobbes's ideas through considering them as solutions to—generally un- or under-considered—Rule of Law-relevant problems. Whilst I defer consideration of the implications of viewing Hobbes in this way until the chapter following my exploration of Locke's ideas, they are hinted at in this chapter.

It is, perhaps, useful that I expand on this idea and put it in a slightly different way: To identify the problems perceivable by Hobbes, I explore Rule of Law-relevant popular pamphlets from the period in which Hobbes was writing *Leviathan* (1646-1651) in order to illuminate Hobbes's Rule of Law-solution and enable a more fine-grained understanding of his Rule of Law to be developed; this enables differentiation of Hobbes's ideas from the relative caricature that is frequently adopted in the Rule of Law literature. By taking this approach, it is possible to refine our understanding of Hobbes's Rule of Law and illustrate a methodology that brings clarity to the Rule of Law debate more generally.

The structure adopted to illustrate this point is simple. Yet the execution is, necessarily, lengthy as a result of trying to bring together various strands of intellectual endeavours.¹ In its simplest terms, I first outline the caricatures of both Hobbes and the Rule of Law that are commonly applied, before detailing why it is important to view both of these in context and, more particularly, in the problem / solution terms that I advocate. Then, I apply these ideas to Hobbes's context and his work in *Leviathan* and conclude that, by taking a contextual approach to Hobbes's work, it is possible to identify—far more clearly—the meaning of the Rule of Law-like solution that Hobbes proposed.

Given the lengthy nature of this chapter, it is useful to set out, in a little more detail, the relative structure that I adopt. In the next part, I argue that, notwithstanding a trend in the Rule of Law debate that would suggest otherwise, Hobbes can be considered as contributing to ideas associable with the concept of the Rule of Law. This is, in part, due to the broad definition of the concept that I adopt (to avoid viewing the concept through a presentist lens). I also illustrate two caricatures frequently adopted in the Rule of Law debate; the first relates to the concept of the Rule of Law, and the

¹ The lengthy exposition in this chapter does, however, provide a methodological base upon which the next chapter can rest.

other to Hobbes's sovereign. Whilst I return to the caricatures throughout the chapter, I initially raise them to both show that the caricatures alone should not be used to invalidate consideration of Hobbes as having Rule of Law-like ideas and, crucially, to illustrate a contemporary disjunction in Hobbesian analysis: although consideration of Hobbes in Rule of Law-terms has increased in recent times, the views regarding his relevance to the Rule of Law have markedly diverged. Where Hobbes's text and meaning has not altered, but our views in relation to the Rule of Law-relevance of his account have, I suggest it is, in fact, our understanding of the Rule of Law that has changed; and, it is for this reason that we should not simply admit any presently accepted conception as being objectively correct.

Then, in the next part, I illustrate the importance of going beyond the caricatures and considering Hobbes's ideas in context. Here, after introducing the idea in Chapter 2, I expand the problem / solution methodology—to suggest that we can only properly understand a Rule of Law-solution if we understand the correlative Rule of Law-problem—before arguing this justification also holds in relation to Hobbes's ideas. To do this, I outline the nature of Hobbes's context when writing *Leviathan* and consider whether exploring Hobbes's Rule of Law-like ideas actually adds anything. My conclusion is that appreciation of the problems perceivable by Hobbes is

both fundamental to any contextual analysis and is also under-appreciated in discussions of the Rule of Law.

The second-half of the chapter commences with a part, appropriately, entitled: *Hobbes's Rule of Law in Context*. Here, I step away from theory and consider the problems that were *actually* perceivable by Hobbes. Through recourse to arguments contained in pamphlets that were popular during the period Hobbes was writing *Leviathan*, I identify six forms of problem that were immanent concerns of society during the authoring period. I then argue—notwithstanding the view that would follow from the caricature of Hobbes's account that only one of the problems is being responded to—that Hobbes's *Leviathan* not only does respond to all six, but also that it would be highly desirable to refine our understanding (or appreciation) of his ideas in the context of these problems. When this approach is adopted, constraints on a sovereign's powers emerge that enable Hobbes's account to be categorised as being Rule of Law-relevant. Unsurprisingly, I end the chapter with some brief conclusions.

One final introductory comment is apposite. In making my point, I am conscious that I do not provide a detailed account of Hobbes's *Leviathan*.² Given my argument—that analytical benefits will flow following the consideration of his account in terms of a problem / solution approach—I do not need to set out his whole account; I merely need to illustrate that *additional* clarity follows from this approach. Nevertheless, in what follows I do, where necessary, provide some (brief) additional details in relation to Hobbes's account. Instead of providing a single abstract explanation of Hobbes, I do this in the context of each point.

HOBBS'S RULE OF LAW: SUBSEQUENT CONCEPTIONS

In this part, I answer the question: how is Hobbes, generally, understood in relation to the Rule of Law? Whilst much of the earlier commentary of Hobbes in Rule of Law discussion is in negative terms—suggesting that Hobbes is *not* relevant to the Rule of Law—contemporary discussion about Hobbes and his relationship to the Rule of Law has been on the increase. In short, there is simply *more* discussion of Hobbes—in both negative and positive terms—in relation to the Rule of Law in contemporary

² For a detailed contemporary account of *Leviathan*, see NOEL MALCOLM, THOMAS HOBBS: LEVIATHAN (2012).

times. In order to address this disjunction, I propose contextual analysis to enhance analytical clarity.

Hobbes and the Rule of Law: Caricatures in the Rule of Law debate

If the Rule of Law is a concept that opposes the imposition of arbitrary power, then Hobbes's *Leviathan* is, some would suggest, largely opposed to the very idea of the Rule of Law. Hobbes may, therefore, appear to be a peculiar choice of subject to explore the Rule of Law. This could be borne out by the fact that Hobbes has little or no mention in many of the most well-known Rule of Law accounts.³ Hobbes's conception should, however, be considered in Rule of Law terms. To illustrate this, I outline two caricatures—one relating to the concept of the Rule of Law, and the other relating to Hobbes's sovereign—and suggest the first can, in some respects, be seen as

³ For example, there is no mention of Hobbes in LON L. FULLER, *THE MORALITY OF LAW* (1964); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (2 ed. 2009). Further, there is no mention in these general texts: JØRGEN MØLLER & SVEND-ERIK SKAANING, *THE RULE OF LAW: DEFINITIONS, MEASURES, PATTERNS AND CAUSES* (2014); CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* (2014); TOM BINGHAM, *THE RULE OF LAW* (2010). There is only brief—non-foundational—mention in other sources, for example: GIANLUIGI PALOMBELLA & NEIL WALKER, *RELOCATING THE RULE OF LAW* 4, 176–177 (2009); FRIEDRICH A. VON HAYEK, *THE CONSTITUTION OF LIBERTY* 243 (1960). A little more detail is provided in BRIAN Z. TAMANAHA, *ON THE RULE OF LAW HISTORY, POLITICS, THEORY* 47–48, 57 (2004).

being under-inclusive and can be usefully extended in more abstract terms, whilst the second caricature's utility is enhanced by an additional level of nuance. The caricatures, however, merely provide a starting point and should not be used to preclude further consideration that may contradict their basic positions. In short, my aim is to dispel, at this early stage, any suggestion that preconceived notions of Hobbes's relationship to the Rule of Law—as reflected in the caricatures—may conspire to invalidate my examination of *Leviathan*.

The arbitrariness caricature in the Rule of Law

It is frequently stated—and is a Common Assumption—that the Rule of Law is a contested (or, even, an essentially contested) concept.⁴ In the debates regarding the concept's content, the varying conceptions could accurately be described as being 'often conflicting and not infrequently rather confused'.⁵ The nature of the fundamental contestedness relating to the conceptual content of the concept of the Rule of Law, and the various nuances of the ongoing debate, is also well known.⁶ Whilst it remains the case

⁴ For this and the other Assumptions of the Rule of Law, see Chapter 2.

⁵ Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW PHILOS. 1–43, 1 (2004).

⁶ For a summary of these debates, see Chapter 3.

that there is no universally accepted formulation of the concept, a frequently stated—abstract and conceptually very broad—idea is that the Rule of Law restricts the imposition of arbitrary power. This formed one of Dicey's desiderata, was important in Locke's ideas, and has also been attributed to Aristotle.⁷ If any, simple and briefly stated, caricature of the Rule of Law—that relates both to purpose and function whilst not contradicting a substantial number of the most frequently cited conceptions—could be suggested, it would, undoubtedly relate to the Rule of Law's role in preventing the exercise of arbitrary power (the '*arbitrariness caricature*').

Yet, the arbitrariness caricature—notwithstanding its conceptual breadth—could be seen as being too narrow and under-inclusive. Whilst my focus remains on 'thin' or formal Rule of Law ideas generally considered in conceptual analysis,⁸ I do not mean that 'thick' Rule of Law ideas—like

⁷ JOHN LOCKE, TWO TREATISES OF GOVERNMENT §135 (Peter Laslett ed., Student ed. 1988); A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188–198 and 202–203 (10 ed. 1979); ARISTOTLE, T. SINCLAIR & TREVOR J. SAUNDERS, THE POLITICS 1287a1 (1981).

⁸ For a general overview of the 'thin' / 'thick' association, see Paul Craig, *Formal and Substantive Conceptions of the Rule of Law an Analytical Framework*, PUBLIC LAW 467–487 (1997). For an explanation of my rationale behind adopting a solely thin view, see Chapter 3: Formally Framing the Discussion.

democracy and human rights⁹—should be included. What I mean is that restricting analysis of the Rule of Law to simply reflecting the idea of ‘non-arbitrary rule’ may simply reflect our own contemporary biases;¹⁰ a boundary reflecting only arbitrariness risks excluding ideas that could relate to the Rule of Law if conceived more broadly. This risk may be heightened where an examination, as is the case here, is substantially historical. To avoid the assumption reflected in the arbitrariness caricature, an expansive view of the concept’s potential meaning could be taken. Accordingly, I take the Rule of Law, whatever else it may be, to be a concept relating to the imposition of a normative force upon the exercise of power (‘the normative force conception’). Of course, this could be seen as being overly simplistic and overly broad. But this slight expansion over the arbitrariness caricature seems capable of retaining some analytical benefit whilst avoiding the importation of what could be seen as a contemporary bias. Furthermore, as a broader ‘catch-all’ idea that avoids attempting to narrow the definition’s focus or to argue for the accuracy of a particular conception, the normative force

⁹ See, for example, the United Nation’s ‘thick’ version in UN SECURITY COUNCIL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES - REPORT OF THE SECRETARY-GENERAL 4 (2004), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (last visited Jul 20, 2018).

¹⁰ See Chapter 1.

conception provides a working definition that—whilst not intuitively abhorrent to the Rule of Law—avoids the need to adopt particular desiderata that are not endorsed by all theorists. However, in order to ensure a comprehensive approach, I also use the two elements of the Rule of Law from Chapter 3: Comprehension and Procedural Pellucidity (the 'Rule of Law elements').¹¹ I consider any idea that satisfies either the normative force conception, or contains the Rule of Law elements, as being a Rule of Law-like idea. Identification of Rule of Law-like ideas in this way avoids imposing an overly specific presentist conception of the Rule of Law whilst, at the same time, ensuring that ideas related to the Rule of Law can be located.

The sovereign's caricature in Hobbes's Leviathan

Many simply fail to see Hobbes as a Rule of Law thinker at all.¹² Whilst taking a restrictive view of the historical conceptual content of the Rule of Law risks conceptual impoverishment,¹³ Hobbes's sovereign in *Leviathan* is, for

¹¹ These require, respectively, that: an individual be able to comprehend the nature, content and operation of the rules to which he or she is subject; and, that the creation and application of any rules must be in terms capable of being clear and obvious to all concerned.

¹² See, for example, Jean Hampton, *Democracy and the Rule of Law*, 36 NOMOS 13–44 (1994). See also my comments above at note 3.

¹³ See Chapter 1.

those who conceive of the Rule of Law in terms akin to the arbitrariness caricature, not immediately associated with the Rule of Law.¹⁴ Hobbes's sovereign is often drawn as being a ruler exercising largely arbitrary and unlimited power and is, perhaps even most frequently, caricatured—in terms where there can be no higher power to which the sovereign is subject—as fundamentally opposing the idea that law can rule.¹⁵ In fact, Hobbes's idea is sometimes seen as epitomising the problem to which the Rule of Law

¹⁴ As I will provide a more detailed exegesis of Hobbes's position in the following parts, here I simply report and comment on the general approach apparent in the literature.

¹⁵ For example: Richard Bellamy, *The Rule of Law and the Rule of Persons*, 4 CRIT. REV. INT. SOC. POLIT. PHILOS. 221–251, 232 (2001); Hampton, *supra* note 12; Daniel B. Rodriguez, Matthew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY LJ 1455, 1464 (2009); Chesterman, *supra* note 8 at 335; RONALD A. CASS, THE RULE OF LAW IN AMERICA 3 (2001).

responds.¹⁶ Where the sovereign is seen as exercising absolute authority,¹⁷ it is frequently stated that Hobbes's sovereign and the theory generally represents Rule by Law.¹⁸ Hobbes's sovereign is, according to this caricature,

¹⁶ Richard H. Fallon Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUMBIA LAW REV. 1-56, 7 (1997); Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, in GETTING TO THE RULE OF LAW 64-104, 94 (James Flemming ed., 2011); Augusto Zimmerman, *Waiting for the Rule of Law in Brazil: A Meta-legal Analysis of the Insufficient Realization of the Rule of Law in Brazil*, 38 in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT), 332 (James R. Silkenat, James E. Hickey, & Peter D. Barenboim eds., 2014); Mortimer Sellers, *What Is the Rule of Law and Why Is It So Important?*, 38 in THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT), 8 (James R. Silkenat, James E. Hickey, & Peter D. Barenboim eds., 2014); Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANNU. REV. LAW SOC. SCI., 15 (2016); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. LAW REV. 781, 788 (1989). A related idea is that the Rule of Law takes us *beyond* the Hobbesian position. See, for example, Sampford, *supra* note 8; Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2016 ed. 2016), <http://plato.stanford.edu/entries/rule-of-law/> (last visited Jul 20, 2018).

¹⁷ W. Burnett Harvey, *The Rule of Law in Historical Perspective*, 59 MICH. LAW REV. 487-500, 489-90 (1961); Krygier, *supra* note 16 at 9; Emilio Santoro, *The Rule of Law and the "Liberties of the English": The Interpretation of Albert Venn Dicey*, in THE RULE OF LAW: HISTORY, THEORY AND CRITICISM 153-200, 170 (Pietro Costa, Danilo Zolo, & Emilio Santoro eds., 2007).

¹⁸ PALOMBELLA AND WALKER, *supra* note 3 at 133; Waldron, *supra* note 16; Gerald Postema, *Fidelity in Law's Commonwealth*, in PRIVATE LAW AND THE RULE OF LAW 17-40, 36 (Lisa M Austin & Dennis Klimchuk eds., 2014).

antithetical to the Rule of Law by virtue of the arbitrary and absolute nature of the power wielded (the '*sovereign's caricature*').

The sovereign's caricature is, however, not adopted by all. Some have sought to expose problems with the application, use, or relevance of the idea.¹⁹ Some positively oppose the idea that Hobbes is *not* a Rule of Law thinker by suggesting, instead, that Hobbes's theory: is capable of providing a rudimentary idea of the Rule of Law; does include Rule of Law relevant aspects; is—if it is about anything—about the Rule of Law; or, pioneers the modern account of the concept.²⁰ In taking these views into account, conceiving of Hobbes in Rule of Law terms is far from unprecedented. Wholesale abandonment of Hobbes as a Rule of Law thinker should, therefore, not be too hastily adopted simply because the sovereign's caricature does not immediately tally with the arbitrariness caricature. By adopting a broad idea of the Rule of Law—as a normative force upon the

¹⁹ Michael P. Zuckert, *Hobbes, Locke, and the Problems of the Rule of Law*, 36 NOMOS 63–79 (1994); David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 LAW PHILOS. 461–498 (2001).

²⁰ LARRY MAY, *LIMITING LEVIATHAN HOBBS ON LAW AND INTERNATIONAL AFFAIRS* 107 (2014); Jeremy Waldron, *Separation of Powers in Thought and Practice*, BOSTON COLL. LAW REV. 433, 449 (2013); Zuckert, *supra* note 19; Ryan E. Carlin, *Rule-of-Law Typologies in Contemporary Societies*, 33 JUSTICE SYST. J. 154–173, 156 (2012); MICHAEL OAKESHOTT, *ON HISTORY AND OTHER ESSAYS* 161–178 (1999).

exercise of power, or in considering the satisfaction of the Rule of Law elements—there is no reason *not* to consider Hobbes in terms of the Rule of Law; after all, Hobbes does admit of *some* restraints on the sovereign.²¹ These restraints are not unacknowledged in accounts that view Hobbes's sovereign as not being bound by law,²² as well as in more nuanced—Hobbes-centric—positions that suggest the sovereign: is not constrained by law but also cannot exercise arbitrary power; is bound by law; or, is conceived as a law maker within the idea of the Rule of Law.²³ In this sense, whilst the caricature is merely doing what a caricature is intended to do—illustrating the simplified, and most prominent, features of the thing being scrutinised—it is not a useful or beneficial formulation to adopt in relation to the Rule of Law.

It seems to be no coincidence that the differences in view—between those that largely exclude the possibility of Hobbes contributing to Rule of Law ideas, and more nuanced views that appear more open to Hobbes's inclusion—broadly reflect the level of focus on and space afforded to consideration of Hobbes. Putting this another way, studies that are more

²¹ I expand upon this point across the next two parts.

²² As suggested, for example, by Waldron, *supra* note 16; Zuckert, *supra* note 19.

²³ Martin Loughlin, *The Political Jurisprudence of Thomas Hobbes*, in *HOBBS AND THE LAW*, 16 (David Dyzenhaus & Thomas Poole eds., 2012); Dyzenhaus, *supra* note 19; MICHAEL OAKESHOTT, *HOBBS ON CIVIL ASSOCIATION* 66 (2000).

Hobbes-centric (and less Rule of Law-centric) seem more inclined to identify Hobbes as making a positive contribution to Rule of Law ideas.²⁴ This may be unsurprising. It could occur, perhaps, because a lack of space may, effectively, force authors of Rule of Law-centric works to adopt a caricature; alternatively, and more cynically, it could occur because authors of Hobbes-centric studies may be *looking* for concepts that *can* be attributed to Hobbes (as a form of confirmation bias). The more charitable view, and the one that I take, is that a more nuanced and detailed appreciation affords and increases the prospect of Hobbes's ideas reflecting some form of Rule of Law-positive viewpoint. Or, putting this another way, a deeper appreciation of Hobbes may reveal ties to the Rule of Law that the sovereign's caricature fails to identify. It is, therefore, useful to consider which / whether aspects of Hobbes's *Leviathan*, when considered broadly, can be useful or relevant to the Rule of Law debate.

Taking a more nuanced view of the sovereign's caricature—and expanding the arbitrariness caricature—may yield analytical benefits that

²⁴ I expand on this point in the next section. However, I am not blind to the 'other' perspective or way to view this stated position: that studies that are more focused on the Rule of Law are *less* likely to consider Hobbes as being a contributor to the concept. As nothing fundamental turns on the point, I have chosen to express the point in positive terms.

support, or at least do not oppose, exploring the idea of the Rule of Law in terms of Hobbes's *Leviathan*. Consideration of a Hobbesian account of the Rule of Law is, then, not as untoward as it may initially appear if the two caricatures are viewed in isolation. Hobbes *may*, therefore, be considered as being an author of Rule of Law-like ideas. In what follows, I use this basic position to argue for *further* nuance and suggest that consideration of the context of Hobbes's ideas allows us to shed light on the meaning that should be attributed to his idea which is, in turn, capable of illuminating the concept of the Rule of Law more generally.

Hobbes's Rule of Law: Who Said What (and When)

In this section, I illustrate in more detail that, whilst Hobbes's work is, in the contemporary literature, generally *not* considered as relating to the concept of the Rule of Law, there has also been a contemporary increase in the number of accounts that *do* associate Hobbes with the Rule of Law. This relative disjunction in Hobbesian Rule of Law analysis requires more clarification than that offered above. Whilst the caricatures provide general guidance, a more nuanced understanding is necessary to draw out the positive aspects and to expose the way that Hobbes is presently understood, and what he is taken to mean, in this context.

Hobbes's relevance to the Rule of Law has in both positive *and* negative senses increased in the contemporary literature. I do not intend to make an empirically verifiable claim here; and I also do not claim to have reviewed every single Rule of Law work or to have identified each mention of Hobbes within each of the works identified. My aim is far simpler: to illustrate that, at least in the contemporary Rule of Law-centric literature, Hobbes's association with the Rule of Law is *generally* seen in negative terms. This occurs both through intention and omission. An intention-related account would actively suggest he is *not* a Rule of Law thinker (for example, by stating his theory relates to Rule *by* Law). An omission-related account would suggest Hobbes is *not* a Rule of Law thinker by failing to mention Hobbes in basic accounts of what the Rule of Law is.

Broadly speaking, omission- and intention-related accounts are reflected, respectively, in older and more contemporary positions. Whilst various popular early Rule of Law accounts by Locke and Dicey omit mention of Hobbes's Rule of Law-like ideas,²⁵ this is to be expected where there is no scholarly tradition of citation or where there was no specific nomenclature upon which to fasten ideas. A stronger indication of the omission-related

²⁵ LOCKE, *supra* note 7; DICEY, *supra* note 7. These accounts were first published in 1690 and 1885 respectively.

negative treatment of Hobbes, comes from the host of Rule of Law usual suspects together with lesser known works across the 20th century, and early 21st century.²⁶ The omission of any mention of Hobbes in these works is clear. But what of the intention-related negative treatment? Hobbes's ideas are frequently related to the *problem* to which the Rule of Law responds by; placing him in *opposition* to a Rule of Law;²⁷ reflecting *Rule by Law*;²⁸ or, stating that Hobbes favours absolutism.²⁹ In this sense, and with broad

²⁶ FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (Bruce Caldwell ed., 2007); FULLER, *supra* note 3; RAZ, *supra* note 3; James Routh, *The Classical Rule of Law in English Criticism of the Sixteenth and Seventeenth Centuries*, 12 J. ENGL. GER. PHILOL. 612–630 (1913); H. W. Arndt, *The Origins of Dicey's Concept of the "Rule of Law"*, 31 AUST. LAW J. 117 (1957); JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (2004); MØLLER AND SKAANING, *supra* note 3.

²⁷ For examples, see *supra* note 16. A related idea is that the Rule of Law takes us *beyond* the Hobbesian position. See, for example, Sampford, *supra* note 8; Waldron, *supra* note 16.

²⁸ PALOMBELLA AND WALKER, *supra* note 3 at 133; Waldron, *supra* note 16; Postema, *supra* note 18 at 36.

²⁹ See, for example, Bellamy, *supra* note 15 at 232; Krygier, *supra* note 16 at 9; Waldron, *supra* note 16; TAMANAHA, *supra* note 3 at 47; Hampton, *supra* note 12 at 13–44; Eric Heinze, *Power Politics and the Rule of Law: Shakespeare's First Historical Tetralogy and Law's 'Foundations'*, 29 OXF. J. LEG. STUD. 139–168, 142 (2009). For a slightly older mention in relation to the history of the Rule of Law, see Harvey, *supra* note 17 at 489.

reliance on the arbitrariness caricature, Hobbes's account is seen as being antithetical to, or simply not being, the Rule of Law. In broad terms, despite the assertion that both intention- and omission-related accounts explore the same concept, intention-related accounts reflect a contemporary—albeit negating—interest in Hobbes's Rule of Law-like idea; yet, older approaches simply fail to include Hobbes as a Rule of Law-relevant thinker.

In what may initially appear to be a contradictory statement, contemporary accounts *also* reflect positive treatment of Hobbes in relation to the Rule of Law. Mention of Hobbes in relation to the Rule of Law has, in recent years *and* in both positive and negative terms, increased; this negative / positive divide broadly maps, respectively, onto works primarily focused on the concept of the Rule of Law, and those primarily focused on Hobbes. Contemporary works *focused on Hobbes* (and not on the concept of the Rule of Law) frequently portray Hobbes as a Rule of Law thinker. Several of the most influential have been produced in the years since 2010,³⁰ several more have since the turn of the millennium,³¹ and various others within the last 35

³⁰ Loughlin, *supra* note 23; MAY, *supra* note 20; Waldron, *supra* note 20; Ryan E. Carlin & Rodolfo Sarsfield, *Rethinking the Rule of Law: Concepts, Measures, and Theory*, 33 JUSTICE SYST. J. 125–130 (2012).

³¹ Dyzenhaus, *supra* note 19; OAKESHOTT, *supra* note 23.

years.³² Prior to this, positive acknowledgement—or, indeed, any acknowledgement—of Hobbes's Rule of Law-relevance is scarce.³³ As Hobbes's account in *Leviathan* has not changed, yet the broad-based nature of the accounts relating to it have, I make the suggestion—and, for the moment, it can be no more than this—that the move toward the understanding or acceptance of the conceptual content of the Rule of Law has changed over time.³⁴ It is this change that I wish to explore.

The reason for increased Rule of Law-reference to Hobbes over the last few decades could reflect the increased volume of scholarship in general, the change in scholarly practices already mentioned, or an increased interest and awareness of Hobbes that has impacted thoughts and thinkers associated with the Rule of Law.³⁵ This could suggest a disagreement as to the meaning

³² In addition to those in the previous two notes, see also Zuckert, *supra* note 19; OAKESHOTT, *supra* note 20. (Whilst the Oakeshott book was published in 1999, the first edition was published in 1983.)

³³ This reflects the omission-related accounts' dominance over intention-related accounts.

³⁴ For an extended discussion related to this point, see the Common Assumption that the Rule of Law has changed over time in Chapter 2.

³⁵ In a very basic sense, there has been a marked increase in the relative use of both phrases in the available corpus commencing 35 years ago. This is supported by a Google Ngram search of the phrases 'Hobbes' and 'Rule of Law'. Google Ngram Viewer, SEARCH OF "HOBBES,RULE OF LAW" 1651-2008,

of Hobbes's ideas or the meaning of the concept of the Rule of Law. This provides an interesting backdrop to the consideration of Hobbes and his Rule of Law-like ideas. To clarify the nature of this disagreement, I develop the context in which Hobbes was working, and resolve the question of how his Rule of Law-like ideas should be viewed.

THE IMPORTANCE OF (HOBBS'S) CONTEXT

In this part, I illustrate the importance of going beyond the caricatures and considering Hobbes's ideas in the context of their authoring. To do this, I first expand Chapter 2's general justification of this methodology, before arguing this general justification holds in relation to Hobbes's ideas.

The Importance of the Rule of Law in Context

There exists a wealth of research in relation to both the concept of the Rule of Law and the meaning and context of Hobbes's ideas; yet, the two strands of literature—the contextualist ideas frequently associated with intellectual history, and the Rule of Law literature relating to the conceptual

https://books.google.com/ngrams/graph?content=Hobbes%2Crule+of+law&year_start=1651&year_end=2008&corpus=15&smoothing=5&share=&direct_url=t1%3B%2CHobbes%3B%2Cc0%3B.t1%3B%2Crule%20of%20law%3B%2Cc0 (last visited Jul 20, 2018).

content of the Rule of Law—have not been brought together.³⁶ A detailed intellectual history literature explores the historical context in which various Rule of Law-relevant texts were authored; yet, these works do not explore the Rule of Law specifically. Whilst the idea of examining Rule of Law ideas in context is not new,³⁷ contemporary consideration of Hobbes frequently reflects the sovereign's caricature. A contextualist examination brings the literatures together and enables identification of Hobbes's account's relevance to the Rule of Law in a way that avoids the use of the caricatures.

I suggest only one way to conduct a contextualist examination without making the bolder claim that it is necessarily paramount. This idea modifies

³⁶ For an application of the principles suggested herein to the international Rule of Law, see Paul Burgess, *Deriving the International Rule of Law: an Unnecessary, Impractical and Unhelpful Exercise*, (FORTHCOMING). For an approach that seeks to contextualise the international Rule of Law generally, see Ian Hurd, *The International Rule of Law: Law and the Limit of Politics*, 28 ETHICS AMP INT. AFF. 39–51 (2014); IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW 2 and 3 (2017).

³⁷ For example, a compelling case was made for reading Dicey's Rule of Law idea in context in 1959, in F.H. Lawson, *Dicey Revisited. I*, 7 POLIT. STUD. 109–126 (1959); F. H. Lawson, *Dicey Revisited. II*, 7 POLIT. STUD. 207–221 (1959). For the general position that contextualising Hobbes is beneficial, see 'The Context of *Leviathan*' Michael Oakeshott, *Introduction*, in HOBBS ON CIVIL ASSOCIATION, 2–9 (2000); Jeffrey R. Collins, *Interpreting Thomas Hobbes in Competing Contexts*, 70 J. HIST. IDEAS 165–180 (2009); Glenn Burgess, *Contexts for the Writing and Publication of Hobbes Leviathan*, 11 HIST. POLIT. THOUGHT 675–702 (1990).

the 'Cambridge School' of intellectual history (most frequently associated with Quentin Skinner³⁸) by also applying Collingwood's logic of questions and answers.³⁹ When considered in Rule of Law terms, the suggestion is that we can only properly understand a (Rule of Law-relevant) solution if we understand the correlative (Rule of Law-relevant) problem. Exploring the Rule of Law this way seems unlikely to represent an unattractive proposition as the Rule of Law has itself previously been described as a solution concept.⁴⁰ By identifying the precise meaning, interpretation, and operation of the problem perceivable by a particular author, an understanding of the context in which the author's theory is situated can be identified. Accordingly, and as introduced in Chapter 2, a Rule of Law idea can be seen as part of a dialogue (of sorts) as the societal position and the Rule of Law conception exist in a

³⁸ For the classic formulation of this position—that requires a close assessment of exactly what an author was doing in her or his text—see Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. THEORY 3–53 (1969).

³⁹ Robin George Collingwood, *Chapter V: Question and Answer*, in AN AUTOBIOGRAPHY 29–43 (1939).

⁴⁰ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW PHILOS. 137–164, 158 (2002); Noel B. Reynolds, *Grounding the Rule of Law*, 2 RATIO JURIS 1–16, 5 (1989); Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career*, in LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 327–346, 327 (Richard Nobles & David Schiff eds., 2014).

problem / solution relationship.⁴¹ In putting these ideas together, it is possible to illustrate more precisely what, for that author, was meant by the Rule of Law-like idea at the point of writing. In the very least, this method facilitates refinement of any methodology based solely on consideration of the Rule of Law (as a solution *sans* problem) and provides increased precision in identifying the nature and meaning of any conception. It certainly affords an analytical benefit over caricature-based assessments of the conceptions.

It is necessary to make one assumption in adopting this approach: a Rule of Law-thinker's idea of the Rule of Law represents her solution to a (Rule of Law-relevant) problem that was, in the very least, perceivable by her.⁴² On this basis, identification of the problem is critical. This aspect is, however, not only fundamental to this approach, but also is, I suggest, fundamentally under-appreciated in the discussions of the Rule of Law.⁴³

⁴¹ A similar approach to Hobbes's ideas—and each piece of political philosophy springing from a new vision of a particular problem—can be seen in OAKESHOTT, *supra* note 23 at 6–7.

⁴² I address the feasibility of this assumption in the next part: *Hobbes's Rule of Law: in Context*.

⁴³ Regarding the importance of considering the origins and precise nature of conceptions of the Rule of Law, and the dearth of consideration in these terms, see Chapter 1. See also Quentin Skinner, *The Ideological Context of Hobbes's Political Thought*, 9 HIST. J. 286–317 (1966).

Hobbes's Context

To dispel any suggestion that commonly known facts about the authoring may invalidate the problem / solution approach, I must expand upon Hobbes's basic background. This is—by no means—a complete exposition, but it will provide a sufficient base on which to assess the context of *Leviathan's* authorship and subsequent publication in January 1651.⁴⁴ These facts relate to: the time during which Hobbes wrote *Leviathan*; Hobbes's exile in France for the entire duration of the authoring of *Leviathan*; and, the motivation for and the intended audience of the work. I explore these in the following sub-sections in terms of the Environmental, Relational and Authorial Contexts (respectively).

Environmental Context

Whilst debate exists regarding the precise dates between which *Leviathan* was written, I will take the dates as being between January 1646,

⁴⁴ The academic literature on Hobbes and *Leviathan* is vast. In this part, I principally cite three authors: Noel Malcolm; Richard Tuck; and, Quentin Skinner. My focus on their, well regarded, works more than adequately suffices for the general background I provide.

and January 1651 (the '*authoring period*'). A brief rationale for this position follows.

The environment in which Hobbes was writing was fundamentally different to that which exists in contemporary democracies. England had been—and could still be considered as being—ravaged by a civil war that commenced in early 1642, and which had followed, and overlapped with, the Thirty Years War that ended in 1648. The rebels, as supporters of parliamentary sovereignty, sought a change in the way that Charles I had ruled that was also related to fears of papist rule. Royalist supporters, and Charles himself, advocated the King's near-absolute or even divine powers that were questioned through parliament's refusal to grant the King funds.⁴⁵ The parliamentarians sought a form of more popular rule in which the King's powers were subject to parliamentary control. Although the hostilities included the tyrannicide of Charles I in January 1649, the end of the war is frequently considered to have occurred following the Battle of Dunbar in September 1650; this event indicated to Hobbes that parliamentary rule was now assured.⁴⁶ Whilst it is often noted that Hobbes was writing in *response* to

⁴⁵ See, for example, the late-1648 work by Robert Filmer, *The Necessity of the Absolute Power of all Kings*, in *PATRIARCHA AND OTHER WRITINGS* 172–183 (1991).

⁴⁶ MALCOLM, *supra* note 2 at 79.

the civil war,⁴⁷ debate exists about the amount of *Leviathan* that was written by the time the war ended. Nevertheless, it seems to be widely agreed that the writing process was at least underway around that time.⁴⁸ In any event, the period post-Dunbar and pre-publication is short and afforded little time for substantial authoring.⁴⁹ If writing was almost complete around that time, this could, perhaps, account for the suggested change in Hobbes's approach when it became apparent—after the battle—the royalist cause was lost.⁵⁰

In addition to the Civil War itself, another event is suggested to have played a fundamental role in influencing Hobbes's views in *Leviathan*: the

⁴⁷ See, for example, ROSS HARRISON, *HOBBS, LOCKE, AND CONFUSION'S MASTERPIECE: AN EXAMINATION OF SEVENTEENTH-CENTURY POLITICAL PHILOSOPHY* 10 (2002). It has also been suggested that Hobbes was writing in response to the problems in England as well as in late sixteenth century France: Oakeshott, *supra* note 37 at 7. Hobbes, himself, in the final paragraph of *Leviathan* notes his writing was 'occasioned by the disorders of the present time...': RICHARD TUCK, *HOBBS: LEVIATHAN: REVISED STUDENT EDITION* [395]-[396] (2 (Rev.) ed. 1996).

⁴⁸ For a view that the bulk of the work was completed *before* the battle of Dunbar, see TUCK, *supra* note 47 at liv. For a view that approximately two thirds of *Leviathan* was complete before the battle, see MALCOLM, *supra* note 2 at 59.

⁴⁹ For the suggestion that the text was complete in manuscript form in December 1650, see MALCOLM, *supra* note 2 at 9; TUCK, *supra* note 47 at liv. Regarding the process being complete in January 1651, see QUENTIN SKINNER, *3 VISIONS OF POLITICS: HOBBS AND CIVIL SCIENCE* 11 (2002).

⁵⁰ MALCOLM, *supra* note 2 at 52, 56, 72-75; TUCK, *supra* note 47 at xliii-xliv.

Engagement Crisis.⁵¹ Commencing in 1649, the Engagement Crisis relates to the royalists' loyalty to the new parliamentary regime. Whilst the precise intent regarding Hobbes's work is debated,⁵² there is, nevertheless, some agreement that the debate amongst royalist exiles becomes polarised and *Leviathan* could be seen as an answer to some of these issues.⁵³ I think this is correct if the scope of the problems is broadened slightly beyond the precise confines of engagement itself (or, at least, in defining that idea broadly). Placing the Engagement Crisis of 1649 in the context of authoring, various commentators place the dates of authoring *Leviathan* between early 1649 and late 1650.⁵⁴ However, there are some—albeit more speculative—dates of inception as early as January 1646;⁵⁵ a date that coincides with a wave of

⁵¹ Skinner has mounted a sustained argument that the point of *Leviathan* is to contribute to the debate in this controversy. See, SKINNER, *supra* note 49 at 289. Cf. Glenn Burgess, *Usurpation, Obligation and Obedience in the Thought of the Engagement Controversy 1*, 29 HIST. J. 515–536 (1986); Burgess, *supra* note 37; GLENN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION* (1996).

⁵² Burgess, *supra* note 37.

⁵³ MALCOLM, *supra* note 2 at 58; TUCK, *supra* note 47 at xii.

⁵⁴ For the suggestion that authoring commenced in January 1649, see TUCK, *supra* note 47 at xi. For the start of authoring around Autumn 1649, see MALCOLM, *supra* note 2 at 9; SKINNER, *supra* note 49 at 228. For late 1647–early 1649, see Burgess, *supra* note 37 at 676.

⁵⁵ MALCOLM, *supra* note 2 at 57–58. For further doubt on a 1646 inception date—despite this being referenced by Hobbes himself—see SKINNER, *supra* note 49 at 15–

compositions (where royalists in England were offered the chance, in effect, to pay to prevent their lands being seized).

In taking account of this debate, the identification of problems that *could* relate to the authoring of *Leviathan* (as a solution) would benefit from adopting an inclusive approach. Accordingly, I delineate the authoring period as commencing with the compositions, through the Engagement Crisis and the execution of the King, up until the manuscript was submitted: between January 1646, and January 1651.

Relational Context

Hobbes was in exile in Paris for an 11-year period encompassing the entirety of the authoring period. This crucial factor is both important to my consideration and is frequently overlooked. His exile ended around a year after the publication of *Leviathan*.⁵⁶ With reference to the basic assumption I

16. Doubt is also cast on Hobbes's claimed inception date of 1645, where it is suggested that this may simply have related to the collation of ideas. See MALCOLM, *supra* note 2 at 10-12. Alternate dates, for example, mid-1647, have also been suggested. For mention of this, albeit where a later inception date is applied, see Burgess, *supra* note 37 at 676, 682.

⁵⁶ TUCK, *supra* note 47 at lix; MALCOLM, *supra* note 2 at 6, 79; SKINNER, *supra* note 49 at 22.

adopt—that Rule of Law-ideas represent a solution to perceivable (Rule of Law-relevant) problems—Hobbes's physical estrangement from England may call into question the nature of the problems that were perceivable by him.

England's affairs were, nevertheless, immanent in Hobbes's thoughts despite not being physically present. Whilst the Parisian intellectual environment was of great interest to Hobbes,⁵⁷ he was very much integrated into Charles II's exiled royal court and was involved in tutoring the young prince in mathematics.⁵⁸ The extent of his integration is illustrated by his concerns over damage that may be caused to the young prince's reputation through the incorrect suggestion of the nature of his tutoring in the publication of the second edition of *De Cive*.⁵⁹ Association with the court placed him in a position to receive—and be concerned with—news and updates from England. Communications were relatively efficient. It was already possible to transmit key information within days⁶⁰ and to rapidly

⁵⁷ For mention of Hobbes's early interactions with Galileo, see HARRISON, *supra* note 47 at 10. Hobbes was involved with the intellectuals surrounding Mersenne. See, THOMAS HOBBS, THE CORRESPONDENCE: VOLUME I: 1622-1659 xxii (Noel Malcolm ed., 1994); JEFFREY R. COLLINS, THE ALLEGIANCE OF THOMAS HOBBS 61 (2007).

⁵⁸ SKINNER, *supra* note 49 at 15; OAKESHOTT, *supra* note 23 at 2.

⁵⁹ MALCOLM, *supra* note 2 at 53-54.

⁶⁰ For the suggestion that, for example, news of the battle of Dunbar reached Paris in just over a week, see *Id.* at 79.

exchange documents between the France and England.⁶¹ This ability facilitated a debate regarding the engagement controversy,⁶² the receipt of information regarding the situation in England,⁶³ and involvement with the debates from France.⁶⁴ Accordingly, there is no reason to think that being in Paris, within a society of expatriates interested in political events in England, provided any more of an impediment to remaining informed than being in any other part of England (outside of London). Hobbes's geographical estrangement does not, therefore, provide a significant impediment to my problem / solution methodology.

⁶¹ For an exposition of the complicated and remote process of publication of *Leviathan* with an English Publisher, see *Id.* at 206–207, 209.

⁶² See, for example, SKINNER, *supra* note 49 at 232, 276–7. Whilst Skinner's position is questioned by Malcolm, the *ability* of Hobbes to contribute through having access to the debates is not questioned. See MALCOLM, *supra* note 2 at 67.

⁶³ Skinner, for example, quotes Hobbes's suggestion the exiled courtiers' delivery of news regarding the victories of Parliament prompted his authoring *Leviathan*. SKINNER, *supra* note 49 at 15. In making this point, Skinner references THOMAS HOBBS, 1 THOMÆ HOBBS MALMESBURIENSIS OPERA PHILOSOPHICA QUÆ LATINE lxxxi–xcix (Sir William Molesworth ed.,).

⁶⁴ In correspondence, Hobbes stated 'I haue no inclinations to the place where there is so little security...' Thomas Payne, CORRESPONDENCE: PAYNE TO SHELDON (1649). This is referenced, and quoted, in MALCOLM, *supra* note 2 at 78.

Authorial Context

It would be peculiar to consider the contexts already outlined without considering where *Leviathan* sits in relation to Hobbes's other works and, further, the target and purpose of *Leviathan* itself. The impact of civil war (generally) seems readily perceivable to Hobbes's writing of *Leviathan* as political unrest also occurred in France during his period of exile;⁶⁵ however, Hobbes's other political writing—including *The Elements of Law* and *De Cive*—were also authored during a civil war or conflict.⁶⁶ In May 1640, mere months before the start of the Civil War, *The Elements of Law* was completed; its strongly royalist account of power is suggested as one reason why Hobbes fled to France.⁶⁷ *De Cive*, written in Paris shortly after the start of the civil war in early-1642,⁶⁸ contained many similar and interrelated arguments to *Leviathan*. (It has been suggested Hobbes had *De Cive* on his desk whilst writing the later work.⁶⁹) An English version was published in 1651.⁷⁰

⁶⁵ It is also suggested that previous conflicts in France, as well as England, provided inspiration for Hobbes. See Oakeshott, *supra* note 37 at 7.

⁶⁶ Loughlin, *supra* note 23 at 12.

⁶⁷ MALCOLM, *supra* note 2 at 2; SKINNER, *supra* note 49 at 8. See also HOBBS, *supra* note 57 at 115.

⁶⁸ MALCOLM, *supra* note 2 at 2.

⁶⁹ *Id.* at 12.

⁷⁰ SKINNER, *supra* note 49 at 303.

Notwithstanding these contributions, Hobbes's focus in France—at least in the years before the authoring period—seems to have been focused on optics, mathematics, physics, and logic.⁷¹ Furthermore, it is also sensible to consider that—whilst many see Hobbes as providing one of the first positivist accounts⁷²—he was writing at a time when the natural law tradition dictated the terms for legal theory.⁷³

Given Hobbes's very recent contribution to political thought in *De Cive*, and where Hobbes is thought to have not been displeased with the thoughts contained therein,⁷⁴ it seems sensible to query, *why* Hobbes would be moved to write *Leviathan*. In effect, we should ask both who was the target, and what was the purpose, of *Leviathan*?⁷⁵ First, however, it is instructive to consider some differences with Hobbes's earlier works.

⁷¹ MALCOLM, *supra* note 2 at 3; SKINNER, *supra* note 49 at 5–7.

⁷² See, for example, discussion of this characterisation by Loughlin, *supra* note 23 at 6–7. See also OAKESHOTT, *supra* note 23 at 45. However, arguments have also been made that Hobbes is better characterised as an 'anti-positivist'. See Dyzenhaus, *supra* note 19 at 465.

⁷³ Dyzenhaus, *supra* note 19 at 465.

⁷⁴ MALCOLM, *supra* note 2 at 2–3.

⁷⁵ Hobbes's corpus also includes *Behemoth*. Although this relates to the struggle for power over the English in relation to the Civil War, its authoring and publication

Leviathan has been described as a 'new version' of *De Cive* or as a continuation or vulgarisation of earlier work, but there are significant differences in the assumptions on which the arguments are based.⁷⁶ Given the broad similarities, one could see the latter work as a simple restatement; but this would be a mistake as there are similarities *and* differences in both the content and presentation of *Leviathan*.⁷⁷ The differences include: the focus on the ideas of authorisation and the concept of an artificial person in *Leviathan*;⁷⁸ the addition of content relating to the acquisition of sovereignty;⁷⁹ and, the increased focus on religion, the addition of new chapters, and the focus on human psychology.⁸⁰ The focus of *Leviathan* also changes—with the first half of the text taking a more practical approach to princely advice.⁸¹ The changes in the last two parts regarding religion—in

occurs considerably later than *Leviathan* and is—as a result of its inability to evidence meaning at the time of Hobbes writing *Leviathan*—not considered here.

⁷⁶ SKINNER, *supra* note 49 at 11–13. See also THREE-TEXT EDITION OF THOMAS HOBBS'S POLITICAL THEORY: THE ELEMENTS OF LAW, DE CIVE AND LEVIATHAN, (Deborah Baumgold ed., 2017).

⁷⁷ A detailed exposition of the differences can be found in: MALCOLM, *supra* note 2 at 12–24.

⁷⁸ *Id.* at 15–16.; SKINNER, *supra* note 49 at 13 and Ch. 6.

⁷⁹ MALCOLM, *supra* note 2 at 33.

⁸⁰ *Id.* at 13–14.

⁸¹ *Id.* at 56.

contrast to the earlier parts of the book which could be considered as enhancing earlier arguments—differ most markedly from earlier works,⁸² as the second half represents a substantially new work.⁸³

There are many potential reasons for change. They could, in the earlier parts, relate to attempts to enhance consistency,⁸⁴ or as responses to issues with earlier works' arguments.⁸⁵ This reason (at least in relation to the parts drafted before the end of the war), could also relate to his being a loyal royalist.⁸⁶ (Although, a line of thought suggests the work is an attempt to respond to arguments *within* the royalist camps.⁸⁷) Debate regarding Hobbes's reasoning is rife: Skinner argues Hobbes's reason was, fundamentally, to contribute to the Engagement Crisis;⁸⁸ yet, Malcom suggests there is no textual evidence for this and Burgess claims Skinner's position can only be attributed to the Review and Conclusion of *Leviathan*—as an afterthought, as the text's real purpose (as a support of the royalist cause)

⁸² TUCK, *supra* note 47 at xxxviii and xxxix.

⁸³ MALCOLM, *supra* note 2 at 15.

⁸⁴ *Id.* at 19.

⁸⁵ *Id.* at 15.

⁸⁶ *Id.* at 22.; SKINNER, *supra* note 49 at 21.

⁸⁷ MALCOLM, *supra* note 2 at 25; TUCK, *supra* note 47 at xii.

⁸⁸ This is the fundamental thesis in SKINNER, *supra* note 49.

was overtaken before its completion—and the rest of the work responds to the European philosophical enterprise.⁸⁹ The work has also been attributed to a general response to the century's turmoils or predicament of mankind.⁹⁰ In summary, there is little consensus regarding the rationale behind the changes.

As to the intended audience for the work, its publication in England, and the authoring of the work in English, suggests it is aimed at an English audience,⁹¹ and more particularly—given the practical focus on ruling—an English Prince.⁹² However, the relative difference between the earlier and later parts of the book *could* suggest Hobbes had abandoned royalist ideas and, perhaps, sought to attract a more favourable audience.⁹³ (The decision to do so could have been taken sometime in the 12 months preceding

⁸⁹ MALCOLM, *supra* note 2 at 67; Burgess, *supra* note 37 at 676–677, 679, and 692.

⁹⁰ TUCK, *supra* note 47 at xlv; OAKESHOTT, *supra* note 23 at 51. This point seems to have some support from Hobbes who, in the last paragraph of *Leviathan* suggests the work is a response 'occasioned by the disorders of the present time'. TUCK, *supra* note 47 at [395].

⁹¹ SKINNER, *supra* note 49 at 19. Although, as Malcolm points out, the intent to print in England cannot be inferred at the outset of authoring. MALCOLM, *supra* note 2 at 51.

⁹² MALCOLM, *supra* note 2 at 52.

⁹³ TUCK, *supra* note 47 at xlv.

August 1650.⁹⁴) What seems clear, is that by the time the final paragraphs of the Review and Conclusion were penned—although the book’s theoretical root did not change—the intention was to show people *could* submit to the new parliamentary regime.⁹⁵

The complexity of Hobbes’s writing context is apparent. Hobbes’s perception of, and response to, the turmoil around him may have been a factor in his decision to refine or augment previous ideas and to publish *Leviathan*. The nature of these potentially perceivable problems can be illuminated through examining the period’s pamphlets.

The Importance of Context in Understanding Hobbes

It is now relevant to ask the more specific question: Does considering Hobbes’s Rule of Law-like ideas in context add anything? I think it does. I think it not only adds clarity to Hobbes’s meaning, but it also provides a way to see beyond the sovereign’s caricature and the arbitrariness caricature that conspire to cause analytic confusion. In other words, a contextual assessment of Hobbes’s Rule of Law ideas is capable of revealing nuances that the

⁹⁴ MALCOLM, *supra* note 2 at 59.

⁹⁵ *Id.* at 72–4, 80.

sovereign's caricature fails to identify⁹⁶ and can go some way toward addressing the disagreement as to the meaning of Hobbes's ideas or the meaning of the concept of the Rule of Law.

Before I illustrate one way of contextualising problems perceivable by Hobbes at the time he was writing *Leviathan*, it is useful to first consider what may—to many—be an obvious point: Hobbes's context is very different to our contemporary context.⁹⁷ By specifically stating this point, I want to ensure that it is not trivialised or overly simplified where the arbitrariness caricature may, otherwise, be readily paired with the sovereign's caricature. Arbitrariness, as it exists in Hobbes's *Leviathan*, reflects a different concern to that which presently exists.⁹⁸ Hobbes—who was considered a royalist—was writing *Leviathan* in the aftermath of a civil war and the removal and replacement of a monarchical sovereign with a sovereign parliament (that will be) headed by a Lord Protector. A number of questions were being raised in relation to the legitimacy, legality, and authority of the new government. The aim was to

⁹⁶ A similar point is made by Malcolm: *Id.* at 82.

⁹⁷ This—obvious—statement parallels the—equally obvious—third Common Assumption of the Rule of Law in Chapter 2: *Contemporary Conceptions Differ to Historical Conceptions*.

⁹⁸ I delve into the precise nature of these details in the next part.

answer whether the new government could be lawfully obeyed.⁹⁹ The turbulence associated with these upheavals cannot be underestimated. Whilst arbitrariness can be seen in contemporary democratic societies, when compared to the arbitrariness that concerned Hobbes, the two senses are factorially differentiable. As a result of the potential for the underlying problems to be seen as fundamentally different, there is value in both considering the precise context of Hobbes's Rule of Law-like ideas, and for doing so in more detail than any caricature would afford.

HOBBS'S RULE OF LAW: IN CONTEXT

By conceiving of Hobbes's idea of the Rule of Law in problem / solution terms, a more nuanced understanding of Hobbes's Rule of Law-like idea can be attained. I detail the problems perceivable by Hobbes through recourse to the arguments contained in popular pamphlets that were published during or immediately prior to the period in which Hobbes penned his solution (to the pamphleteers' problems) in *Leviathan*. I then outline the way in which the solution relates to the problem before illustrating the difference between this meaning and the generally accepted Hobbesian meaning.

⁹⁹ SKINNER, *supra* note 49 at 228.

Societal Context: The Pamphleteers' (Rule of Law) Problem

After a brief explanatory note about the nature and benefits of exploring pamphlets, I outline, each in a separate subsection, the fundamental problems identifiable from popular pamphlets during the authoring period (January 1646-January 1651). The subsections' titles reflect the problems' categorisation:

- The form, nature and structure of government;
- The necessity of (the people's) consent and its effect on the legality / legitimacy of the government;
- The impact and relevance of possession (of governmental power);
- The duty, or obligation, of obedience from protection;
- The needs or ultimate ends of society; and,
- The purpose or ends of government.

This order, broadly, reflects the order in which the problems came to prominence through the authoring period. I must be careful here. I am not, nor do I need to, make specific claims regarding the exclusivity or periodisation of the problems. There is no necessary linearity to their invocation. There are, however, broad trends that lend—tentative—support to the ordering adopted.

Pamphleteers: a brief explanation of nature and purpose

A pamphlet is a printed tract that can be as short as a page, and as long as a small book. They are easily and rapidly produced and can be made cheaply available. In an era before the internet and anything recognisable as a modern newspaper, pamphlets provided a way to publicly and widely comment, argue, spread news, or comment on events. They were used for propaganda as well as for political, personal, polemical, or profit motivated reasons.¹⁰⁰ The versatility of their production makes a modern equivalent difficult to identify, but they could be conceived as being part tweet, part blog, part news report.

By virtue of the purposes to which they were put, pamphlets provide a detailed record of the Rule of Law-relevant discussions that were taking place and the context in which Hobbes was writing.¹⁰¹ Across the half-decade of the

¹⁰⁰ For an excellent overview of the medium, and its uses, see JASON PEACEY, *POLITICIANS AND PAMPHLETEERS: PROPAGANDA DURING THE ENGLISH CIVIL WARS AND INTERREGNUM* (2004); JOAD RAYMOND, *PAMPHLETS AND PAMPHLETEERING IN EARLY MODERN BRITAIN* (2003).

¹⁰¹ A fantastic and detailed source of pamphlets exists in the Thomason Tracts. This contains a record of over 20,000 documents that were contemporaneously collected and collated by George Thomason. *CATALOGUE OF THE PAMPHLETS, BOOKS, NEWSPAPERS, AND MANUSCRIPTS RELATING TO THE CIVIL WAR, THE COMMONWEALTH, AND*

authoring period, there are more than 5,000 pamphlets preserved in the Thomason Tracts alone.¹⁰² Given I have not limited myself to *only* this store of information, some selection has been necessary. In doing so, I have not adopted any exclusive or restrictive limitations on the idea of a pamphlet. Whilst I have benefited from the vast amount of work that has already taken place in relation to the pamphlets of the period,¹⁰³ as well as work focused specifically on Hobbes's context,¹⁰⁴ I have identified pamphlets that were:

RESTORATION COLLECTED BY GEORGE THOMASON, 1640-1652, (George Thomason ed., 1908).

¹⁰² This figure is based on my very rough assessment of the 413 pages of the Thomason Tract catalogue that covers the authoring period with an average of 12 pamphlets recorded on each of those pages. For the catalogue, see *Id.*

¹⁰³ PEACEY, *supra* note 100; THE REGICIDES AND THE EXECUTION OF CHARLES I, (Jason Dr Peacey ed., 2001); JASON PEACEY, PRINT AND PUBLIC POLITICS IN THE ENGLISH REVOLUTION (2013); RAYMOND, *supra* note 100; NEWS, NEWSPAPERS AND SOCIETY IN EARLY MODERN BRITAIN, (Joad Raymond ed., 1 edition ed. 1999); JOAD RAYMOND, THE INVENTION OF THE NEWSPAPER: ENGLISH NEWSBOOKS 1641-1649 (1996); ALEXANDRA HALASZ, 17 THE MARKETPLACE OF PRINT: PAMPHLETS AND THE PUBLIC SPHERE IN EARLY MODERN ENGLAND (1997); DAVID ZARET, ORIGINS OF DEMOCRATIC CULTURE: PRINTING, PETITIONS, AND THE PUBLIC SPHERE IN EARLY-MODERN ENGLAND (1999); ENGLISH RADICALISM, 1550-1850, (Glenn Burgess ed., 2011).

¹⁰⁴ Skinner, *supra* note 43; SKINNER, *supra* note 49; Quentin Skinner, *Thomas Hobbes and His Disciples in France and England*, 8 COMP. STUD. SOC. HIST. 153-167 (1966); Burgess, *supra* note 37; BURGESS, *supra* note 51; Burgess, *supra* note 51; PEREZ ZAGORIN, A HISTORY OF POLITICAL THOUGHT IN THE ENGLISH REVOLUTION (1954); MALCOLM, *supra* note 2; NOEL MALCOLM, ASPECTS OF HOBBS (New Ed edition ed.

most prominent by considering arguments that are popular and influential (in the sense that these arguments are raised on several occasions by several people as well as provoking a number of responses); enduring (meaning that the arguments subsist across various pamphlets); and, most importantly, Rule of Law-relevant.¹⁰⁵

My focus on pamphlets is conscious and deliberate. Whilst alternative methods may illustrate the problems that were being raised in society, pamphlets provide a way to not only understand both sides of the issue—by virtue of the responses and counter-responses that often accompany initial arguments—but also identify issues that reflect society’s interests by virtue of their being designed to have broad appeal. By aggregating the arguments’ key points under only six headings, not only do I not suggest there are not other problems being discussed—there are—but also, I do not suggest these include every and all problems that *could* have fallen within my categories—

2004); Collins, *supra* note 37; Mark Goldie, *The Reception of Hobbes*, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700 (J. H. Burns, ed., 1991); James J. Hamilton, *The Social Context of Hobbes’s Political Thought*, 11 MOD. INTELLECT. HIST. 1–29 (2014).

¹⁰⁵ In this sense, I rely on the dual meanings of Rule of Law-like ideas from the Rule of Law elements distilled in Chapter 3 as well as the broad normative force idea of the Rule of Law.

there are doubtless others. By identifying these six problems, my aim is merely to illustrate the arguments' broad bases without becoming stuck in the weeds of each pamphlet's finer aspects. Furthermore, whilst many of the pamphlets are polemical, propagandist, or factionally motivated, I do not identify the authors' positions in this respect as I have no interest in the relative positions (or merits of each argument). As my aim is to identify and evidence the general problems perceivable by Hobbes (or anyone else in society), my broad-brush categorisation loses nothing.

The form, nature and structure of government

Following a civil war that questioned God-given monarchical powers, and a shift in the system of government to a hitherto unknown non-monarchical structure, the agitation of questions that explore the appropriate form, nature, and structure of government is both understandable and expected. Questions arose like: Is a monarchy or a parliamentary democracy superior? Is there anything superior to the law? And, is the King subject to the law? Questions like these were raised throughout 1646 and 1647, and

included arguments relating to the logical superiority of the King,¹⁰⁶ and that the King should be dispensed with because individuals—as the descendants of Adam and Eve, being capable of reason—need not suffer tyrannical leaders.¹⁰⁷ Arguments related to the ability of right reason to operate so as to enable men [sic] to preserve themselves, the position of equity as being superior to law, and the inherent sovereignty of the people can be seen in Leveller pamphlets by Overton, as well as and work authored, perhaps, by Wildman.¹⁰⁸ These points were also included in (the first) *Agreement of the People* in 1647, which sets out the basic Leveller manifesto and includes arguments relating to the necessity of a covenant with one another, equality before the law, the importance of rights and a fundamental law, and a new

¹⁰⁶ MARCHAMONT NEDHAM, *THE CASE OF THE KINGDOM STATED* (1647); ANON., *A PARALELL OF GOVERNMENTS* (1647); JOHN COOK D., *REDINTEGRATIO AMORIS* (1647). For an explanation of the importance of these works, see PEACEY, *supra* note 100 at 117.

¹⁰⁷ JOHN LILBURNE, *THE FREE-MANS FREEDOM VINDICATED* 11–12 (1646). See also further explanation in ZAGORIN, *supra* note 104 at 11–12.

¹⁰⁸ RICHARD OVERTON, *AN APPEALE FROM THE DEGENERATE REPRESENTATIVE BODY* 30 (1647). Zagorin suggests that some of these demands were taken from a previous pamphlet of Wildman's. See ZAGORIN, *supra* note 104 at 30. (Attributing authorship to Wildman of THOMAS FAIRFAX, JOHN WILDMAN & ROBERT EVERARD, *THE CASE OF THE ARMIE TRULY STATED* (1647).)

social contract.¹⁰⁹ The arguments, it has been suggested, go beyond democratic constitutionalism and, instead, represent the state—as a state of nature—that the author saw as existing in England at the time.¹¹⁰ They all relate to the idea of the Rule of Law adopted herein.

In exploring the question of the King's superiority, mention must be made of Filmer. In Filmer's *Patriarchia*, published in 1680, he draws a parallel between a father's—non-consent based—power over his children and a King's power over his subjects and suggests, as this is a power derived from God, it cannot be resisted.¹¹¹ Similar arguments by Filmer were available in mid-1648.¹¹² In January 1649, John Cook takes an opposing stance when he—in the speech he would have given, as the government's solicitor, should the King have pleaded to the charges against him—suggests the King had always

¹⁰⁹ EDMOND BEAR, *AN AGREEMENT OF THE PEOPLE FOR A FIRME AND PRESENT PEACE* (1647). Similar demands related to the exploitation of the masses can also be found in later pamphlets. See, for example, ANON., *LIGHT SHINING IN BUCKINGHAMSHIRE* (1649).

¹¹⁰ ZAGORIN, *supra* note 104 at 12–17. (Zagorin attributes authorship of *An Agreement...* to Lilburne.)

¹¹¹ ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (1991).

¹¹² Filmer, *supra* note 45; Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy*, in *PATRIARCHA AND OTHER WRITINGS* 131–171 (J. P. Sommerville ed., 1991).

been subject to the law.¹¹³ In the same month, arguments were also raised as to the superiority of the natural law over both made law *and* the sovereign people,¹¹⁴ and in the following month, Milton—in his *Tenure of Kings and Magistrates*—suggest men [sic] are by nature free, and there exists a right of revolution that extends to the removal of kings—even if not tyrannical—as kings are subject to the law.¹¹⁵ These arguments come amidst pamphlets questioning whether the execution of the King was just,¹¹⁶ and where the charge of tyranny was also laid at the feet of the parliamentary government for failing to heed the wishes of the people.¹¹⁷ Government's legality, and its subjection to the law, remained at issue throughout the authoring period.¹¹⁸ Obedience to government is suggested as being lawful *only* in only certain

¹¹³ JOHN COOK, *KING CHARLS HIS CASE* (1649). For discussion of this point, see ZAGORIN, *supra* note 104 at 79. For later arguments that the Commonwealth is superior to a monarchy, see HENRY ROBINSON, *A SHORT DISCOURSE BETWEEN MONARCHICAL AND ARISTOCRATICAL GOVERNMENT* (1649); MARCHAMONT NEDHAM, *CASE OF THE COMMON-WEALTH STATED* (1650).

¹¹⁴ JOHN GOODWIN, *RIGHT AND MIGHT WELL MET* (1648).

¹¹⁵ JOHN MILTON, *THE TENURE OF KINGS AND MAGISTRATES* (1649).

¹¹⁶ ANON., *THE SUBJECTS SORROW* (1649).

¹¹⁷ JOHN LILBURNE, *ENGLANDS NEW CHAINS DISCOVERED* (1649). The importance of this work is explored by SKINNER, *supra* note 49 at 294; *THE INTERREGNUM: THE QUEST FOR SETTLEMENT, 1646-60*, 85 (G. E. Aylmer ed., Revised ed. 1974).

¹¹⁸ FABIAN PHILIPPS, *KING CHARLES THE FIRST, NO MAN OF BLOOD* (1649).

circumstances,¹¹⁹ whilst the Levellers' third *Agreement of the People* declared, inter alia, that: there may not be an exemption for any person to the laws; the laws must be made in English; and, the government is not sovereign as it cannot act in *all* matters.¹²⁰ Hobbes's Rule of Law-like answer in *Leviathan* goes to the heart of these problems. They also play a role in the other problems below.

The necessity of (the people's) consent and its effect on the legality / legitimacy of the government

This problem could be summarised in only a few questions: Is consent necessary to be ruled (and has it been given)? And, is the new regime legal? Arguments related to these questions occur, relatively evenly, throughout the entire authoring period.

The need for consent to be ruled was advocated most vigorously by the Levellers in 1647,¹²¹ and in the following year by Goodwin and Milton.¹²² Similar points were also argued by Lilburne—who sought to argue tyranny

¹¹⁹ ANON., *AN ENQUIRY AFTER FURTHER SATISFACTION* (1649).

¹²⁰ WILLIAM THOMPSON & JOHN LILBURNE, *ENGLANDS STANDARD ADVANCED IN OXFORDSHIRE* (1649).

¹²¹ OVERTON, *supra* note 108; BEAR, *supra* note 109.

¹²² GOODWIN, *supra* note 114; MILTON, *supra* note 115.

follows from the absence of consent¹²³—and by several others in subsequent years.¹²⁴ The legality of the new regime remained at issue and formed a fundamental aspect of the Engagement Controversy. In early 1649, to illustrate obedience was lawful notwithstanding the government's legal status, illegality was assumed as a basis for argument.¹²⁵ This assumption was, however, subsequently repudiated,¹²⁶ and more positive defences of the charge of illegality were mounted.¹²⁷ Notwithstanding this minor U-turn,

¹²³ LILBURNE, *supra* note 117.

¹²⁴ See ROBINSON, *supra* note 113; RICHARD HOLLINGWORTH, *AN EXERCITATION CONCERNING USURPED POWERS* (1650); WILLIAM PRYNNE, *THE ARRAIGNMENT, CONVICTION AND CONDEMNATION OF THE WESTMINSTERIAN-JUNCTO'S ENGAGEMENT* (1649). See also ANON., *EXERCITATION ANSWERED* (1650).

¹²⁵ For the initial statement that although the government may be unlawful, it remains lawful to obey its commands, see FRANCIS ROUS, *THE LAWFULNES OF OBEYING THE PRESENT GOVERNMENT* (1649); JOHN DURY, *A CASE OF CONSCIENCE RESOLVED* (1649). (Rous's pamphlet and the responses it prompted are explored more fully below.)

¹²⁶ ANTONY ASCHAM, *THE BOUNDS & BONDS OF PUBLIQUE OBEDIENCE* (1649).

¹²⁷ JOHN DURY, *CONSIDERATIONS CONCERNING THE PRESENT ENGAGEMENT* (1649); ANON., *A LOGICAL DEMONSTRATION OF THE LAWFULNESS OF SUBSCRIBING THE NEW ENGAGEMENT* (1650).

legality arguments were, however, made both before,¹²⁸ and after this point.¹²⁹

The impact and relevance of possession (of governmental power)

This problem is largely reflected in the pamphlets associated with the Engagement Controversy. A key question related to whether the parliamentarians' possession of government power (as civil war victors) was sufficient to warrant obedience from the population. Dury mounts the first defence based on *de facto* possession, relying on a Calvinist position, in March 1649: even if the government's legitimacy is doubted, it is not the place of individuals to meddle.¹³⁰ The following months saw a flurry of pamphlets in support or opposition. In April, in *The Lawfulness of Obeying the Present Government*,¹³¹ Rous argues that support of the new government—through taking the Oath of Engagement—is consistent with previous oaths to the King, and suggests legality is of no consequence. Citing biblical and

¹²⁸ ANON., *EIKON BASILIKE* (1649). For commentary on this, see THE INTERREGNUM, *supra* note 117 at 85. For related arguments relating to the unjust execution of the king, see ANON., *supra* note 116.

¹²⁹ PHILIPPS, *supra* note 118.

¹³⁰ DURY, *supra* note 125. For further discussion of the impact and terms of this argument, see DURY, *supra* note 122.

¹³¹ ROUS, *supra* note 125.

historical precedent, he argues obedience is lawful, *even if* a change in government is unlawful.¹³² Whilst this resembles Dury's earlier argument, Rous suggests it is only in lawful commands, from a power with no visible force to oppose it, that a *de facto* power is to be obeyed.¹³³ Within weeks, similar arguments are made by Ascham in three works in as many months,¹³⁴ and he expands an earlier argument to suggest those demanding obedience must have possession.¹³⁵ Nedham also makes similar arguments in support of Rous.¹³⁶ Opposition was equally prominent and swift. Commencing in May

¹³² JOHN M. WALLACE, *THE ENGAGEMENT CONTROVERSY 1649-1652: AN ANNOTATED LIST OF PAMPHLETS* (1964); SKINNER, *supra* note 49 at 271, 292; MALCOLM, *supra* note 2 at 35-36, 66-67; *THE INTERREGNUM*, *supra* note 117 at 83. For similar sentiments, see ANON., *supra* note 127.

¹³³ For further detail on this point, see ZAGORIN, *supra* note 104 at 69.

¹³⁴ ASCHAM, *supra* note 126; ANTONY ASCHAM, *A COMBATE BETWEEN TWO SECONDS* (1649); ANTONY ASCHAM, *A DISCOURSE, WHEREIN IS EXAMINED, WHAT IS PARTICULARLY LAWFULL DURING THE CONFUSIONS AND REVOLUTIONS OF GOVERNMENT* (1648). See also later arguments in LEWIS DU MOULIN, *THE POWER OF THE CHRISTIAN MAGISTRATE* (1650).

¹³⁵ ASCHAM, *supra* note 134; ANTONY ASCHAM, *OF THE CONFUSIONS AND REVOLUTIONS OF GOVERNMENTS* (1649). For a similar point, see ANON., *supra* note 127.

¹³⁶ NEDHAM, *supra* note 113. For background and further detail, see MALCOLM, *supra* note 2 at 66-67; SKINNER, *supra* note 49 at 290-300; ZAGORIN, *supra* note 104 at 122; WALLACE, *supra* note 132 at 41-42.

1649, these took the form of arguments that only legal powers should be obeyed as well as doubting the biblical interpretations used by Rous.¹³⁷

The duty, or obligation, of obedience from protection

The question that reflects this problem is: does protection by the government obligate the citizen to obey the government? Although this overlaps with the *de facto* questions raised above, the present question comes to prominence only from late-1649, and flows (as do the issues I explore below) from Ascham's arguments—that duties are owed to a protector—raised in July and August 1649,¹³⁸ before arguing, in November 1649, both that those demanding obedience should have plenary possession and people obey out of fear.¹³⁹ These points lay the foundation for subsequent suggestions that self-preservation is a basic motivation for

¹³⁷ See, for example, NATHANIEL WARD, *A RELIGIOUS DEMURRER, CONCERNING SUBMISSION TO THE PRESENT POWER* (1649); ANON., *THE GRAND CASE OF CONSCIENCE STATED* (1649); JOHN AUCHER, *ARGUMENTS AND REASONS TO PROVE THE INCONVENIENCE & UNLAWFULNESS OF TAKING THE NEW ENGAGEMENT* (1650). The subsequent attacks on Rous generally focused on his interpretation of *Romans*. This is apparent even from the annotated list of pamphlets provided in WALLACE, *supra* note 132.

¹³⁸ ASCHAM, *supra* note 126. This is a defence of Rous, and a reaction to Ward. WARD, *supra* note 137.

¹³⁹ ASCHAM, *supra* note 135.

obedience.¹⁴⁰ Ascham's largely secular point,¹⁴¹ is also taken up in providential terms by others.¹⁴² Whilst often summarised as requiring a mutual obligation between protection and obedience,¹⁴³ it is also put in slightly different terms by Ascham: no obedience also means no protection.¹⁴⁴ A reflection and extension of the point is found in the suggestions that it was for the people to make the best conditions they can with conquerors and powers,¹⁴⁵ and that protection, peace, or the avoidance of confusion is the

¹⁴⁰ ROBERT SANDERSON, *A RESOLUTION OF CONSCIENCE* (1649). This opposes Ascham, as the author separates the force and authority of the government. See, WALLACE, *supra* note 132; SKINNER, *supra* note 49 at 301. See also Ascham's response ANTONY ASCHAM, *A REPLY TO A PAPER OF DR SANDERSONS* (1650).

¹⁴¹ The shift, by some, to fully secular arguments is noted in *THE INTERREGNUM*, *supra* note 117 at 87, 93.

¹⁴² DURY, *supra* note 127. For a response to Dury, see HENRY ROBINSON, *AN ANSWER TO MR. J. DURY* (1650).

¹⁴³ N. W., *A DISCOURSE CONCERNING THE ENGAGEMENT*: (1650); ANON., *CONSCIENCE PUZZEL'D* (1649); SAMUEL EATON, *THE OATH OF ALLEGIANCE AND THE NATIONAL COVENANT PROVED TO BE NON-OBLIGING* (1650); ANON., *MEMORANDUMS OF THE CONFERENCES HELD BETWEEN THE BRETHREN SCRUPLED AT THE ENGAGEMENT* (1650). For commentary on this point, see SKINNER, *supra* note 49 at 275-289.

¹⁴⁴ ASCHAM, *supra* note 140.

¹⁴⁵ ANON., *supra* note 143.

end—a necessary end—of government.¹⁴⁶ These suggestions frame the following subsections.

The needs or ultimate ends of society

This sub-section and the one following, whilst derived from the previous one, reflect similar ideas viewed from different positions: society's; and, the government's. Whilst the suggestion that peace is society's chief end is first prominently raised by Ascham in mid-1649,¹⁴⁷ consistent attention is not focused on the question until early 1650.¹⁴⁸ By mid-1650, the argument included that society's members need protection from one another and that this can be achieved by yielding to a common power.¹⁴⁹ Whilst, by January 1651, arguments are made that men [sic] should seek peace to remove themselves from the state of nature,¹⁵⁰ before then, in August 1650, societal needs are expressed in terms of *necessity*: what is necessary to preserve a

¹⁴⁶ N. W., *supra* note 143; ANON., *supra* note 143; SANDERSON, *supra* note 140; NEDHAM, *supra* note 113.

¹⁴⁷ ASCHAM, *supra* note 134; ASCHAM, *supra* note 126.

¹⁴⁸ ANON., *supra* note 127; N. W., *supra* note 143; S. W., THE CONSTANT MAN'S CHARACTER (1650); NEDHAM, *supra* note 113.

¹⁴⁹ NEDHAM, *supra* note 113. For a view of Nedham in these terms, see SKINNER, *supra* note 49 at 280-1.

¹⁵⁰ HENRY PARKER, SCOTLANDS HOLY WAR (1651).

safe society is an absolute power.¹⁵¹ These sentiments relate intimately to the purposes or ends of government outlined immediately below.

The purpose or ends of government

We now consider a similar problem, but from the government's perspective. Arguments related to government's purpose or ends largely parallels government's necessity, and the mutual obligation of protection and obedience, outlined above. A related argument regarding the purpose of the law is initially made in 1649,¹⁵² before it is argued in the *Memorandums*, in August 1650, that the Government's purpose is to provide mutual recognition.¹⁵³ Despite this specific argument, it is possible to infer a purpose or end of government if the government's purpose is seen as correlative to society's needs, and by considering these as the same relationship viewed from a different perspective.¹⁵⁴ Should this be the case, it is possible to infer a

¹⁵¹ ANON., *supra* note 143.

¹⁵² GERRARD WINSTANLEY, A LETTER TO THE LORD FAIRFAX (1649). See also, ANTHONY ASCHAM, THE ORIGINAL & END OF CIVIL POWER (1649).

¹⁵³ ANON., *supra* note 143. For further discussion, see SKINNER, *supra* note 49 at 300; WALLACE, *supra* note 132.

¹⁵⁴ In this respect, I have in mind something akin to the way in which Hohfeld views relationships between parties. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE LAW J. 710-770 (1917).

governmental purpose when considering the problems regarding both the needs and ends of society as well as—more obviously—the duty and obligation of obedience when protection is provided.¹⁵⁵ For example, if society's members need protection from one another, one purpose of government that could be inferred is that this protection should, in some way, be provided.¹⁵⁶

Why the Problems are Rule of Law-like Problems

Each of the six problems can be conceived as falling either within the normative force conception, or the Rule of Law elements. In relation to the normative force idea, it is clearly the case that there is an impact on the way that power is / may be exercised that relates to the problems raised. The problems' satisfaction of the Rule of Law elements is, perhaps, not as intuitively obvious. Comprehension is necessary for the society to understand where and how power will be exercised; this flows from the imposition of or consent to a known governmental structure, or from knowledge of the extent or nature of what is required by either government (the form/structure of

¹⁵⁵ See the previous two sub-sections for references to the particular points.

¹⁵⁶ I appreciate that this requires some assumptions regarding the role and necessity of government in society. I provide no evidence for this. However, my point generally does not depend on any inferred purpose or end of government.

government; as well as the necessity of consent) or the people (the relevance of possession; obedience for protection; society's needs; and, government's ends). Procedural pellucidity is satisfied, albeit largely implicitly, as each of the problems relate to the need for some formal / procedural structure that must be seen—and be seen to be seen—in the imposition of power.

Hobbes's Solution to the Pamphleteers' (Rule of Law) Problem: Only One Problem?

I have identified six Rule of Law-like problems from the authoring period's popular pamphlets. Hobbes, in *Leviathan*, answers all of these and not merely one of them (as would be the case if a caricature is adopted). Solutions to these problems were debated across a vast number of pamphlets that were read by large numbers of people in England (and beyond). The sheer number suggests a substantial market and substantial readership; the nature of the debate indicates an educated, informed and interested public;¹⁵⁷ and, the problems' reoccurrence suggests the issues remained unresolved.

¹⁵⁷ Here, I do not directly challenge Habermas's idea of the 'public sphere' in JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (1 ed. 2015). However, there do exist arguments to

Despite being in France, there is no reason why Hobbes could not have been actively engaged with these problems. My argument does not rely on Hobbes having read all or any of these pamphlets. I use the evidence above merely to illustrate the *existence* of the problems.¹⁵⁸ All that matters for my argument is that the problems, in the terms that I have broadly categorised, reflect problems considered to exist in society (by the pamphleteers or by their readers). In this sense, the problems in the pamphlet debates reflect a societal reality and, where Hobbes is part of that society, he too is exposed to the problems that are reflected in the pamphlets; it, therefore, makes no difference whether Hobbes has been exposed to the *particular* (reflected) versions of the problems as they exist in the pamphlets. Accordingly, I do not attempt to show that Hobbes read any

amend the temporal boundaries. Delineation of the public sphere has been questioned and suggestions made that this should be extended into the mid 17th century, see for example NEWS, NEWSPAPERS AND SOCIETY IN EARLY MODERN BRITAIN, *supra* note 103 at Ch 5; PEACEY, *supra* note 100 at 314; HALASZ, *supra* note 103 at 42. See also, ZARET, *supra* note 103. In relation to the literacy rates during the time, see Peter Burke, *Popular Culture in Seventeenth Century London*, in POPULAR CULTURE IN SEVENTEENTH CENTURY ENGLAND 31-58, 49 (Barry Reay ed., 1988).

¹⁵⁸ It is for this reason that I have not separated the various points into their various polemical or political camps; where the arguments came from or the authors' ultimate goal is of no moment.

of the texts; it is enough for me to show the problems were a real concern in Hobbes's society.

Consider for a moment several pamphleteer arguments already outlined that suggest: men [sic] should seek peace to remove themselves from the state of nature;¹⁵⁹ what is necessary to preserve a safe society is an absolute power;¹⁶⁰ yielding to a common power protects society's members from one another;¹⁶¹ peace is society's chief end;¹⁶² people obey out of fear;¹⁶³ self-preservation is a basic motivation for obedience;¹⁶⁴ consent to be ruled is necessary;¹⁶⁵ and, the formation of a social contract is necessary.¹⁶⁶ Even on the basis of the sovereign's caricature, these sound very much like Hobbes's arguments. Whilst I make no suggestion that he derived his arguments from

¹⁵⁹ PARKER, *supra* note 150.

¹⁶⁰ ANON., *supra* note 143.

¹⁶¹ NEDHAM, *supra* note 113.

¹⁶² ASCHAM, *supra* note 134; ASCHAM, *supra* note 126.

¹⁶³ ASCHAM, *supra* note 135.

¹⁶⁴ SANDERSON, *supra* note 140.

¹⁶⁵ OVERTON, *supra* note 108; BEAR, *supra* note 109.

¹⁶⁶ BEAR, *supra* note 109.

these texts, it is both important and relevant to note that arguments of this sort were not unpopular at the time he was writing.¹⁶⁷

What does all this mean in terms of Hobbes's solution to the pamphleteers' problem? First, the title of this section specifies 'the pamphleteers' *Rule of Law* problem' because pamphlet selection has been made on the basis of the arguments having some relevance to the broad ideas of the Rule of Law I have adopted. The point of this is to focus on the issues regarding Hobbes's Rule of Law-like ideas and to argue that Hobbes's context—illustrated by the problems in society—assists in clarifying Hobbes's meaning. This requires that Hobbes's solution—consisting of the Rule of Law-like ideas in *Leviathan*—be considered in terms of the (six) problems I have identified as existing in society at the time of authoring.

The sovereign's caricature in Hobbes's Leviathan (reprise)

The sovereign's caricature provides a solution to one of the six problems evident when Hobbes was writing. I think Hobbes meant to answer

¹⁶⁷ Some of the arguments could have been borrowed from Hobbes's earlier works *De Cive* (1642) and *The Elements of Law / De Corpore Politico* (1650). See, for example, THOMAS HOBBS, *DE CIVE: THE ENGLISH VERSION: OR, THE CITIZEN* (Howard Warrender ed., 1984); THOMAS HOBBS, *THE ELEMENTS OF LAW, NATURAL & POLITIC*, (Ferdinand Tonnies ed., 1928).

more than just this problem. Failing to appreciate this—even in caricatures of Hobbes’s Rule of Law-like idea—can lead to fundamental unclarity in relation to his account generally.

Recall that the sovereign’s caricature reflects a ruler exercising largely arbitrary and unlimited power, where there can be no higher power and where the sovereign rules as an absolute ruler exercising absolute authority. These are all structural or formal aspects of sovereignty. Thinking of this from the other perspective, the *other* (five) problems that I have identified do *not* raise issues that can be solved by the terms of the sovereign’s caricature. To illustrate, I split the remaining problems (other than the formal/structural problem) into two categories of problems: societally-focused; and, government-related. Societally-focused problems—that question the need for consent, the nature of the duties that follow from protection, and, the content of society’s needs generally—do *not* call for a solution that requires specification of the nature or structure of the sovereign. They call for a solution regarding what *individuals* or *society* must do. This does not reflect the sovereign’s caricature. Similarly, government-related problems—that raise questions regarding what follows from de facto possession, and the purpose / end of government—call for solutions regarding what the *government* should do in certain circumstances. Neither category necessitates a solution

that describes the nature of the powers exercised (unlimited and absolute) or the structure or form of government (as the highest authority) as is communicated in the sovereign's caricature.

Hobbes did not respond to only one problem; he meant to respond to all of the problems.¹⁶⁸ His responses evidence this. Let us first consider his responses to societally-focused problems. The need for consent is, as is well known, reflected in Hobbes's account of the social contract. He requires that the people provide consent—by compacting with one another—to be subject to a single, absolute, sovereign power.¹⁶⁹ In relation to the second of the societally-focused problems—regarding the duties that flow from protection being provided to society—Hobbes clearly signals his intent to contribute to the debates and reflect some of the disorders of the present time by

¹⁶⁸ Of course, I cannot illustrate Hobbes's actual intent; this is a familiar problem in relation to any form of intellectual history. By illustrating the close parallels of Hobbes's account, I hope that it will be clear that the theory he proposes not only neatly matches the problems but also that it makes more sense when viewed in these terms.

¹⁶⁹ Hobbes puts it best: '*I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.*' TUCK, *supra* note 47 at [87] (italics in original). See also, *Id.* at [107] and [391].

adopting the 'mutual relation' phrase used in the pamphlets.¹⁷⁰ It is also clear that, in relation to Hobbes's theory generally, there is a near absolute duty to obey any command of the sovereign as long as the sovereign provides protection and prevents society lapsing again into war.¹⁷¹ Here, he clearly means to respond to the duty / protection problem. In relation to the needs of society as the final societally-focused problem, society's need could be expressed as being to avoid being in the state of nature, and as this requires individuals be protected from one another, they agree to be subject to a sovereign that can provide this protection. Hobbes's position is that the end of society is to avoid war and to seek peace by entering a social contract.¹⁷²

¹⁷⁰ He does this in the final paragraph of the book. The paragraph commences like this: 'And thus I have brought to an end my Discourse of Civill and Ecclesiasticall government, occasioned by the disorders of the present time, without partiality, without application, and without other designe, than to set before mens eyes the mutuall Relation between Protection and Obedience...' TUCK, *supra* note 47 at [395]-[396].

¹⁷¹ 'The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them... The end of Obedience is Protection...' *Id.* at [114]. In the same sense, a subject can disobey the sovereign when his or her life is threatened. See, for example, *Id.* at [109]-[112].

¹⁷² 'The finall Cause, End, or Designe of men... in the introduction of that restraint upon themselves, (in which we see them live in Common-wealths,) is the foresight of their own preservation...' TUCK, *supra* note 47 at [85]. 'The only way to erect such a Common Power... is, to conferre all their power and strength upon one Man, or

The government-relevant problems relate to the duty of protection following obedience, de facto possession and, the purpose / end of government. In relation to the first two, whilst Hobbes does not directly address the question of whether mere possession affords a duty to obey, his theory answers this broadly in the negative as, by virtue of the necessary requirement for a process of consent to place the sovereign into power, Hobbes's sovereign can never be merely in possession: the duty to obey comes from that act of consent.¹⁷³ Accordingly, mere possession could not suffice as this could not, by virtue of the requirements for the establishment of the commonwealth and the sovereign, arise. An answer to the final problem regarding the purpose or ends of government is suggested through the very nature of the compact between the people: individuals compact to obtain protection from one another and they agree to be subject to the sovereign on the basis that protection is provided.¹⁷⁴ The purpose of the government could, therefore, be said to provide this protection; the creation of the government is presupposed on this purpose. Given the way in which the

upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will...' *Id.* at [87].

¹⁷³ TUCK, *supra* note 47 at [87]-[88]. See also extracted quotes in note 169 and, with particular reference to his use of 'only', at 172.

¹⁷⁴ *Id.* at [85]. See also 'finall Cause' quote at 172. (This passage is accompanied by a marginal heading of 'The End of Common-wealth, particular Security:')

various aspects of *Leviathan*—when viewed as solutions—match perceivable problems in society when Hobbes was writing, it seems open to infer Hobbes meant to answer more than *only* the formal or structural problem.

Failing to consider Hobbes's wider scope, even when adopting a caricature, can lead to fundamental unclarity. Whilst Hobbes *does* want to provide an account of the form and structure of government, a more accurate view is provided when his account is also seen as providing solutions to the societally-focused and government-relevant problems ('the *other* problems'). When the failure to take into account the *other* problems is considered, it is clear why Hobbes would usually be seen—especially by those adopting something like the sovereign's caricature—as a non-Rule of Law thinker. In this sense, it is all too easy to write Hobbes off as an absolutist who merely advocates arbitrary powers, and not appreciate his sovereign as a ruler subject to controls on powers that are imposed by the very nature, purpose, and rationale behind the office itself. Where the (six) problems provide a context that illustrates constraints on the sovereign's powers exist, and when the Rule of Law is seen as a normative force constraining the exercise of power or as relating to the Rule of Law elements, Hobbes's ideas are certainly conceivable as Rule of Law-like ideas.

CONCLUSION: THE IMPORTANCE OF HOBBS'S CONTEXT

Is Hobbes's context important? It is if we care not only about clarity, but also about ensuring that we do not neglect, or forget, that the ideas he provides solve problems that go far beyond the solutions that are acknowledged or identified when a mere caricature of his position is applied.

By illustrating that it is possible to conceive of Hobbes as being relevant to (albeit broadly drawn) ideas of the Rule of Law, and by using pamphlets that were popular at the time that Hobbes was writing *Leviathan* to illustrate the problems that were perceivable by Hobbes, I have argued that it is useful, and necessary if heightened clarity is desirable, to consider his account as being a solution to more than a problem regarding the form and structure of government (as is suggested by caricatures of his position). By identifying six categories of problem apparent from pamphlet debates from the time Hobbes was writing, I have illustrated why the caricature view of Hobbes provides an unclear appreciation of Hobbes's meaning: five of the problems perceivable by Hobbes, to which *Leviathan* can feasibly be seen as providing a solution, are not capable of being answered by the caricature. In this regard, it is clear that taking account of Hobbes's broader context provides analytical benefit. Something important is lost when we conceive of Hobbes's Rule of Law-like solution in a way that reflects less than 20% of the

work's potential meaning. Taking a broader view of Hobbes's meaning illuminates a broader–Rule of Law-relevant–gamut of principles that are generally not considered.

One thing that does emerge from this analysis and methodology is the clear conclusion that, even if Hobbes's Rule of Law-like solution in *Leviathan* is not accepted as being relevant to, or appropriately included in, contemporary Rule of Law terms, Hobbes is providing an answer to problems that *would* clearly be seen as being Rule of Law-relevant (in terms of contemporary conceptions). That these Hobbes-perceivable Rule of Law-relevant problems–broadly conceived as being relevant to the form nature and structure of government, questions regarding what the government should do in certain circumstances, and what individuals in society must do–can give rise to what are conceived today as non-Rule of Law-relevant solutions seems a peculiar outcome. Whilst nothing really turns on this aspect, it could be argued that the mere fact that *Leviathan* provides a response to Rule of Law-relevant problems is enough to categorise those solutions as also being Rule of Law-relevant.

By using the context of Hobbes's writing it is possible to differentiate Hobbes's ideas from the relative caricature that is frequently cited. Furthermore, the application of a problem / solution approach not only

brings clarity to the way in which Hobbes is seen and used in the ongoing debate about what the Rule of Law *is*, but also suggests that exploring other authors' ideas (that *are* frequently associated with the Rule of Law) in a similar way—in order to obtain a similarly more fine-grained understanding—may facilitate a greater level of clarity across the ongoing Rule of Law debate more generally. After considering Locke in the next chapter, the ramifications and possibilities that flow from a consideration of change across two more fine-grained accounts will follow.

CHAPTER 5:
ANOTHER LOOK AT LOCKE'S RULE OF LAW:
LOCKE'S NOT A LOCK(E) AFTER ALL?

INTRODUCTION

'Locke's Rule of Law' is not Locke's Rule of Law. What I mean by this is that the generally stated and accepted position regarding the Rule of Law in Locke's *Two Treatises* ('Locke's Rule of Law') is not truly reflective of the Rule of Law position that Locke meant to communicate: Locke's Rule of Law. Disambiguation of these two positions is crucial in circumstances where 'Locke's Rule of Law' is frequently and widely deployed in illustrating what the (contemporary) concept of the Rule of Law *is*. In order to achieve a greater level of clarity in relation to both the concept itself, and Locke's idea's use and / or benefit to the concept, an enhanced understanding of Locke's meaning is essential.

It is necessary—if we want to be clear about exactly what Locke's Rule of Law-like idea was—that we fully comprehend the totality of the problems to which Locke was responding. To do this, we must consider more than the simple form of arbitrary rule to which 'Locke's Rule of Law' is generally taken

to relate. In this chapter, I apply the methodology introduced earlier in the thesis, and applied to Hobbes in the last chapter, to Locke's Rule of Law-like idea in the *Two Treatises*. My goals are similar: illustrate the utility of a contextualist approach to Locke's Rule of Law-like idea; and, disambiguate Locke's Rule of Law and 'Locke's Rule of Law' by considering the meaning that becomes evident from exploring Locke's idea in a problem / solution methodology.

Both the Rule of Law and Locke's *Two Treatises* are considerable fields of study. Academics around the world in law schools and history departments have built careers focused on either one of these ideas. However, as with Hobbes, there have been no attempts to bring together the legal theory aspects (of the Rule of Law conceptual debate) and the contextual intellectual history (regarding the *Two Treatises*) in a way that can fully illuminate what Locke was doing in his Rule of Law-relevant work. This chapter takes one small step toward remedying this. Through a contextualist examination of the Rule of Law-relevant aspects of the *Two Treatises*, I illuminate and illustrate the ways in which Locke's Rule of Law is underappreciated in the Rule of Law literature due to the way that 'Locke's Rule of Law' is frequently caricatured. The most pervasive aspect of 'Locke's Rule of Law', and the one that the contemporary concept of the Rule of Law is most frequently allied with, is the

concept's opposition to the operation or application of arbitrary power.

However, simply bringing these two together fundamentally underappreciates some of the core motivations behind his work. Whilst this is undoubtedly one aspect of Locke's thought, it is not the only, nor is it the most important, aspect of his Rule of Law-like thinking.

Locke's Rule of Law is far from unidimensional; nuances emerge by applying the methodology from the previous chapters. I identify (via popular pamphlets) a number of Rule of Law-relevant problems that exist in England at the time that Locke was writing the *Two Treatises*. In order to identify Rule of Law-like aspects of Locke's work, I use the same Rule of Law definitions. Once I have both Rule of Law-like ideas—a set of problems from the pamphlets, and a set of solutions from Locke—I bring these together to demonstrate that Locke's Rule of Law clearly and obviously is focused on solving some of the most important and widespread Rule of Law-like problems that existed in society. By doing so, I show that the Rule of Law-like solutions that Locke provides cannot—unlike his contemporarily applied caricature—be seen in terms of a concept that merely provides a defence against the exercise of arbitrary power; the account Locke offers, like Hobbes's in the last chapter, focuses on several *additional* problems. The interconnection of these ideas is so fundamental to Locke's account that

divorcing only one of these ideas to create a caricature underappreciates what Locke actually meant. The mere fact that the most popular contemporary view of the Rule of Law—that reflects an opposition to arbitrary power—is echoed in ‘Locke’s Rule of Law’ work is no reason to pre-determine which aspects of his work will be attributed principal or sole importance especially when the conceptions of the Rule of Law are acknowledged to have changed considerably over time.¹

The structure of this chapter is relatively simple; it mirrors the structure of Chapter 4. I first provide some preliminary background details and outline what ‘Locke’s Rule of Law’ is commonly taken to be, as well as restating the adopted definitions for ‘the Rule of Law’. After providing some brief historical background to the period and to Locke more generally, through my recourse to popular pamphlets, I identify (five) Rule of Law-like societal problems that were perceivable by Locke during the time he was writing the *Two Treatises*. Then, I provide a specific rationale for the categorisation of the problems as being Rule of Law-like problems. In the penultimate part—innovatively titled *Locke’s Rule of Law in Context: A Solution and its Problems*—I, illustrate through recourse to the *Two Treatises*, the Rule of Law-like solutions that

¹ See Chapter 2 for an exposition of Rule of Law change over time as a Common Assumption.

Locke provides to the problems identified in the preceding parts. Some brief conclusions close the chapter.

THE RULE OF LAW AND 'LOCKE'S RULE OF LAW'

The nature, operation, and content of the Rule of Law has both varied and changed over time. This idea of change, together with the suggestions that the Rule of Law is both a highly (or essentially) contested concept, and that it has its roots with Aristotle, represent three of four Common Assumptions that can be found at the start of the majority of articles outlining what the Rule of Law *is*.² Whilst these Assumptions will be critically evaluated in this chapter, the main focus relates to the remaining assumption: there are a number of commonly cited and deployed Rule of Law canons as the usual suspects, common to many Rule of Law accounts. Whilst a number of thinkers fall into this category, I focus on only one: Locke.

Before exploring 'Locke's Rule of Law', I must first briefly re-state what I mean by '*the Rule of Law*.' This can be simply done as I have already provided the ideas I will use.³ I continue to consider any idea that satisfies either the

² In relation to the Common Assumptions of the Rule of Law, see Chapter 2. See Chapter 3 regarding the conceptual uncertainty.

³ See Chapter 3 (theory) and Chapter 4 (application).

normative force conception or the Rule of Law elements—Comprehension and Procedural Pellucid—as being Rule of Law-like ideas.

‘Locke’s Rule of Law’

Locke is frequently taken to be a Rule of Law thinker. In this brief section, my goal is merely to outline the aspects of Locke’s thought that are taken to provide support to, or be representative of, the Rule of Law in the Rule of Law literature: ‘Locke’s Rule of Law’. In this sense, I do not intend to endorse—or, for that matter, contradict—those positions. I merely illustrate what ‘Locke’s Rule of Law’ is commonly taken to be by those who regard him as expounding an account of the Rule of Law. To differentiate this commonly adopted way of viewing Locke’s account, I will continue to use ‘Locke’s Rule of Law’ (with scare quotes) throughout this chapter.

The most pervasive aspect of ‘Locke’s Rule of Law’ is its opposition to the operation or application of arbitrary power. The adoption and reference to this aspect of Locke’s thought forms the strongest bond to a conception of the Rule of Law that holds non-arbitrariness as a core function; this connects most strongly to contemporary ideas that also see the Rule of Law in opposition to arbitrariness. The use and deployment of Locke in the

contemporary sphere is, therefore, unsurprising as Locke specifically opposes arbitrary power:

For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and promulgated Laws*: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds, and not be tempted, by the Power they have in their hands...⁴

Locke's quote is drawn from a passage that is remarkable for its use of phrases that are frequently seen in contemporary Rule of Law discourse:

'absolute arbitrary power', 'established and promulgated laws', 'declared and received laws', 'stated rules', and 'settled standing laws'.⁵ Similar—contemporarily recognisable—Rule of Law language also precedes the passage: 'The *Legislative*, or Supream Authority, cannot assume to its self a power to rule by extemporary Arbitrary Decrees, but *is bound to dispense*

⁴ JOHN LOCKE, TWO TREATISES OF GOVERNMENT II, §137 (Peter Laslett ed., Student ed. 1988) (emphasis in the original).

⁵ *Id.* at II, §137. (Lest we miss their importance, Locke was even kind enough to emphasise the phrases quoted here by using italics.)

*Justice, and decide the Rights of the subject by promulgated standing Laws, and known Authoris'd Judges.'*⁶

Reference to Locke in the Rule of Law literature, in circumstances where he makes such stark and clear reference to arbitrariness, is a highly attractive and enticing lure for those that also see arbitrariness as a core feature of the contemporary conception: Julian Sempill refers to Locke's contribution to the Rule of Law project as relating to, *inter alia*, arbitrariness;⁷ Both Brian Tamanaha and Martin Krygier have referred to Locke in terms that set him against arbitrary power;⁸ and Jeremy Waldron also makes arbitrariness the central focus of the discussion when outlining Locke's role in the Rule of Law tradition.⁹ These are far from the only instances of this

⁶ *Id.* at II, §136 (emphasis in the original).

⁷ Julian A. Sempill, *Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power*, 31 JL POL 333, 355–356 (2015).

⁸ Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANNU. REV. LAW SOC. SCI. (2016); BRIAN Z. TAMANAHA, ON THE RULE OF LAW HISTORY, POLITICS, THEORY 49 (2004).

⁹ Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2016 ed. 2016), <http://plato.stanford.edu/entries/rule-of-law/> (last visited Jul 20, 2018). In this respect, Waldron seeks to differentiate the differences in meaning that can be associated with 'arbitrary' *Id.*; JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY: THE HAMLYN LECTURES 35 (2012). The point regarding different meanings of 'arbitrary' between the 17th century and now

association.¹⁰ In this sense, identifying Locke with an account of the contemporary idea of the Rule of Law that also is seen as being opposed to arbitrariness is a relatively straightforward step. It is also clear that the ideas that are considered as being Locke's Rule of Law do fall within the broad idea of the Rule of Law that is adopted herein. However, few authors dig any deeper and consider even the basic meaning of 'arbitrary' for Locke.¹¹ There are other aspects to Locke's ideas; uncovering these Rule of Law-like ideas is the central focus of this chapter.

The potential for the Rule of Law idea communicated by Locke to relate to an—albeit subtly—different idea of arbitrariness is vitally important in circumstances where his idea is frequently invoked to illustrate what the Rule of Law *is*. Some aspect of critical evaluation should be made of Locke's work

was also noted by Reid: JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 41 (2004).

¹⁰ Further examples are: Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. LAW REV. 781, 781 (1989); H. W. Arndt, *The Origins of Dicey's Concept of the "Rule of Law"*, 31 AUST. LAW J. 117, 118 (1957); Fred Dallmayr, *Hermeneutics and the Rule of Law*, CARDOZO REV 1449, 1453 (1990). For a wider association of Locke with arbitrariness, see Julian A. Sempill, *The Lions and the Greatest Part: the Rule of Law and the Constitution of Employer Power*, 9 HAGUE J. RULE LAW 283–314 (2017).

¹¹ This is not true of *all* accounts. See, for example, REID, *supra* note 9 at 41; WALDRON, *supra* note 9 at 35.

to consider whether Locke's Rule of Law—as the idea Locke meant to communicate through his work—reflects 'Locke's Rule of Law'. After all, if his idea of arbitrary was different to the idea of arbitrary that we consider to be part of the contemporary Rule of Law, the two forms should be disambiguated.

LOCKE'S RULE OF LAW IN CONTEXT

I illustrate 'Locke's Rule of Law' is not Locke's Rule of Law by considering Locke's account in the context in which it was authored. By considering Locke's *Two Treatises of Government* as a solution to problems perceivable by Locke during the particular political moment in which his work was being authored, his Rule of Law ideas can be disambiguated from the more contemporary uses to which they have been put.

Locke's Context

Before outlining the specific problems perceivable by Locke, I must provide a basic background to Locke and his *Two Treatises*. The detail provided here is—by no means—a complete exposition, but it will provide a sufficient base on which to assess the context of the *Two Treatises'* authorship

and subsequent publication dated 1690.¹² As I did with Hobbes, here my aim is to dispel any suggestion that any common ideas about the authoring may invalidate the problem / solution approach. These ideas relate to: the time during which Locke wrote the *Two Treatises*; Locke's exile in Holland or his travels around France; and, his motivation for, and the intended audience of, the work. I explore these in the following sub-sections in terms of the Environmental, Relational and Authorial Contexts.

Environmental Context

Debate exists regarding the precise dates between which the *Two Treatises* was written. Nevertheless, I will take the dates of authorship as being between January 1679, and April 1683 (the '*authoring period*'). A brief rationale for this position follows.

The environment in which Locke was writing was fundamentally different to that which exists in contemporary western democracies. As is well known, England had been recently ravaged by a civil war that had seen

¹² The academic literature on Locke and the *Two Treatises* is vast. In this part, and in outlining Locke's background, I principally cite three authors: Peter Laslett, Richard Ashcraft, and John Dunn. This is not to detract from the vast scholarship that exists elsewhere. My focus on their, well regarded, works more than adequately suffices for the general background I need to provide.

Charles I executed, and a period of rule by Oliver Cromwell as Lord Protector, before the monarchy was restored and Charles II was crowned—with retrospective effect back to the date of his father’s execution—in 1660. In the Civil War, the rebels, as supporters of parliamentary sovereignty, sought a change in the way that Charles I ruled. This had, as some important component, a fear of papist rule; Royalist supporters, and Charles himself, advocated the King’s near-absolute or even divine powers that were subsequently questioned when parliament refused to grant the King funds.¹³ The parliamentarians sought a form of popular rule in which the King’s powers were placed under the control of the parliament. Whilst these events are provided by way of deep background, the similarities between this period and those surrounding Hobbes and the Civil War, and the period between 1660 and the Glorious Revolution of 1688, are clearly evident.¹⁴

Following the interregnum, Charles II proved to follow—a little too closely for some—in his father’s footsteps. Locke was still in school when

¹³ See, for example, the late-1648 work Robert Filmer, *The Necessity of the Absolute Power of all Kings*, in *PATRIARCHA AND OTHER WRITINGS* 172–183 (1991).

¹⁴ The Glorious Revolution—whilst outside the scope of Locke’s writing of the *Two Treatises*—relates to the English Parliament’s installation of William and Mary on the English throne against the wishes of Charles II’s successor, James II.

Charles I was executed.¹⁵ Whilst short of being a formal civil war, the subsequent 37 years represented an unprecedented period of political and constitutional turmoil in England. Conflicts between the King and Parliament defined Charles II's reign. These took various forms. Whilst I expand upon them below, it will suffice here to state they (relevantly) included both fears associated with arbitrary rule and absolute power, and conflict over the power available to the King through the existence of a standing army. In addition, fears regarding the influence of the pope represented a central and common problem during the period. This was, perhaps, not unfounded as Charles II's brother—and heir to the throne—James was an openly practicing catholic and Charles was, as it turns out, a closet-catholic that had negotiated secret deals to convert to Catholicism in the near future in consideration of payments from the French King. The constitutional problems were stoked by fear that any catholic ruler would, inter-alia, exist in a state of war with protestant subject and would likely lay claim to their property (as lives, liberties, and property).¹⁶ These fears were sufficient to cause Antony Ashley Cooper, subsequently Lord Ashley and then the first earl of Shaftesbury

¹⁵ Locke was 17 years old, and was likely at school not far from the execution site at the time of the execution. RICHARD ASHCRAFT, *LOCKE'S TWO TREATISES OF GOVERNMENT: VOLUME 17* 13 (1 ed. 2012).

¹⁶ RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT* 17–38 (1986); LOCKE, *supra* note 4 at 16–24.

('Shaftesbury'), to constitute the Whig party largely in opposition to Charles II's policies and in an attempt to ensure parliamentary control and the exercise of power through consent. Shaftesbury was an influential and rich politically active actor who later served as the Lord Chancellor and was, in relation to his leadership of the Whigs as a party of radical opposition to the King, implicated in plots to assassinate the King and his brother, James. In addition, throughout the authorship period (prior to his death in early-1683) Shaftesbury was also Locke's employer and best friend.¹⁷

Debate exists about exactly when the *Two Treatises* was written. It was initially thought that Locke wrote the work to justify the Glorious Revolution shortly before the first edition's publication dated 1690. This dogma has now been dismissed. The accepted orthodoxy is now that the work was completed several years earlier. The vast majority of writing—notwithstanding any subsequent minor edits that may have taken place pre-publication—was completed at or around the time of the Exclusion Crisis (in which the Whigs, through repeated attempts to pass the Exclusion Bill through the House of Commons were repeatedly scuppered by the King's dissolution of

¹⁷ LOCKE, *supra* note 4 at 25–37; ASHCRAFT, *supra* note 16 at 75–87; JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT' 27–29 (1969).

parliament). Laslett's argument that writing had taken place between 1679 and 1681 (or 1683, at the latest), is challenged—at least in relation to the earlier date of completion—by Ashcraft who argues writing was completed in 1680 to 1681 or possibly 1682.¹⁸ The authoring period that I adopt—between January 1679, and April 1683—takes account of the broadest suggestions of these dates. The period commences around the date on which Locke was requested to return to England from France by Shaftesbury to assist with a theoretical argument to justify a change in the constitution.¹⁹ As there is at least broad agreement that a completed draft of—what would become—the

¹⁸ For Laslett's dating, see, for example LOCKE, *supra* note 4 at 35, 51, 59. For Ashcraft's dating, see, for example, ASHCRAFT, *supra* note 15 at 291; Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government: Radicalism and Lockean Political Theory*, 8 *POLIT. THEORY* 429-485, 441-2 (1980). Others place the date in slightly different periods. See for example THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, 618 (J. H. Burns & Mark Goldie eds., 1991). (In which the period is suggested as being between 1681-83.) See also the suggestion that Locke commences drafting the *two Treatises* shortly after March 1679: QUENTIN SKINNER, 3 *VISIONS OF POLITICS: HOBBS AND CIVIL SCIENCE* 33 (2002).

¹⁹ LOCKE, *supra* note 4 at 31; ASHCRAFT, *supra* note 15 at 28. Locke returned to England shortly thereafter in April 1679. ASHCRAFT, *supra* note 16 at 137.

Two Treatises was in existence prior to the date of Locke's escape to Holland,²⁰ the authoring period concludes at this date.²¹

Relational Context and Authorial Context

Locke was immersed in the political and constitutional battles that were endemic in England during his period of employment by Shaftesbury.²² The influence of this relationship on Locke has been put as strongly as stating that 'without Shaftesbury, Locke would not have been Locke at all.'²³ Even at its most benign, this relationship places Locke—as Shaftesbury's amanuensis—in a position that required him to be intimately involved with Shaftesbury's

²⁰ LOCKE, *supra* note 4 at 62–65; ASHCRAFT, *supra* note 16 at 388. The text was, at that time, under the cover name of *de Morbo Gallico*, (trans. 'the French disease'—meaning syphilis—as a possible allusion to the fears of both arbitrary power and popery that were, at that time, prevalent in France). LOCKE, *supra* note 4 at 62.

²¹ ASHCRAFT, *supra* note 16 at 536, 388. Locke left for Holland in August, 1683. *Id.* at 409. See also, LOCKE, *supra* note 4 at 24. It was shortly following Shaftesbury fleeing to Holland—in November 1682—that Locke left Shaftesbury's household. ASHCRAFT, *supra* note 16 at 358–9.

²² Locke was engaged by Shaftesbury, and became part of his household, from 1667, after they first met in Oxford in 1666. ASHCRAFT, *supra* note 16 at 85; LOCKE, *supra* note 4 at 25.

²³ LOCKE, *supra* note 4 at 27.

political commitments.²⁴ A less benign appreciation places Locke in a position as friend, confidant, and author for one of the leading revolutionaries of English politics. In this respect, Locke's relationship with Shaftesbury involved the latter leading a political party intent on securing its objectives through parliamentary means—via the Exclusion Bill—and a revolutionary movement that plotted to overthrow or assassinate the King and his heir.²⁵ Ashcraft has noted a shift in policy between these two extremes that occurred during the authoring period, around 1681-2.²⁶ Notwithstanding this, it seems to be clearly the case that, upon his recall from France by Shaftesbury in early 1679, Locke fostered and maintained a heightened interest in political theory.²⁷ Accordingly, there is little reason to suggest that Locke was unaware of the

²⁴ This extends to the suggestion that Locke wrote the *Two Treatises* for Shaftesbury. *Id.* at 27. This idea will be explored further below. But, cf. Ashcraft, *supra* note 18 at 436.

²⁵ Ashcraft, *supra* note 18 at 431; ASHCRAFT, *supra* note 15 at 292-3. The assassination attempt—related to the Rye House Plot of 1683—and the attempts—that occurred after Shaftesbury's death—to overthrow the King took several iterations including actions regarding Monmouth's Rebellion and the successful installation of William and Mary on the throne.

²⁶ ASHCRAFT, *supra* note 15 at 290-292; ASHCRAFT, *supra* note 16 at 327. The shift correlates with the King's dissolution of the Oxford parliament in January 1681.

²⁷ LOCKE, *supra* note 4 at 56.

broad-based nature of the problems that were being ventilated in the pamphlet literature.

Whilst an assessment of Locke's previous (or subsequent) works is beyond the scope of this chapter, and even though such an assessment is unnecessary for the argument advanced, it is interesting to note that the close relationship between Locke and Shaftesbury, and the nature of the latter's political activism, may have been sufficient to have altered Locke's political perspective that was—in some respects—evident prior to their association.²⁸ The point of mentioning the change is to illustrate the potential influence that Locke's employer and friend may have had on him and to introduce the potential that the ideas contained within the *Two Treatises* may not, necessarily, have been solely the work of a philosopher divorced from both society or any overarching political normative agenda.²⁹ In other words, in forming his thoughts, Locke seems to be influenced by the people, arguments, and society around him. In the exploration of the pamphlets that

²⁸ The shift in focus from a position that was closer to absolutism may have occurred due to the 'community of ideas' that existed as a result of the association from 1669 to 1679. ASHCRAFT, *supra* note 16 at 83–84; LOCKE, *supra* note 4 at 30.

²⁹ Ashcraft makes a similar comment referring to Victorian biographers' attitudes that created the 'myth of Locke's political innocence in order to safeguard their image of him as a detached philosopher.' ASHCRAFT, *supra* note 16 at 86.

follows, it will become clear that Locke's thought—related to the idea of the Rule of Law adopted here—is anything but an original and paradigm shifting exercise in philosophy divorced from reality; not only does Locke provide solutions to problems that are distinctly practical—and not-philosophically focused—but he also provides solutions that are echoed across a wide scope of political tracts during the authoring period.

The Problems (related to Locke's solution)

By conceiving of Locke's idea of the Rule of Law (as the account that Locke meant to communicate) in problem / solution terms,³⁰ a more nuanced understanding of 'Locke's Rule of Law' (as the generally cited account) can be attained. I outline, each in a separate subsection, the fundamental problems that were raised in the pamphleteers' work during the authoring period before explaining why these problems fall within the definition of the Rule of Law.

Locke absorbs, reproduces, and answers in the *Two Treatises* a number of problems that exist in society that are also reflected in the period's

³⁰ For a full argument relating to the problem / solution approach, see Chapter 1 and Chapter 2.

pamphlets.³¹ In illuminating the problems, I have utilised the same approach as in the last chapter: I have identified only the pamphlets that were most prominent by considering arguments that were both popular and influential and related to the broad–two-pronged–meaning of the Rule of Law I adopt.³²

In outlining the problems, I do not state the nature of the problems' relationship to the idea of the Rule of Law that I adopt. (I defer this exposition to the next section.) The problems, and the interrelationships between them, can be represented thus:

³¹ A large number of pamphlets were published throughout the authoring period. Estimates of the number of pamphlets produced, and related to, the Exclusion Crisis—a period encompassed in full by the authorship period—runs to over 200. See, LEE WARD, *THE POLITICS OF LIBERTY IN ENGLAND AND REVOLUTIONARY AMERICA* 8 (2004); O. W. Furley, *The Whig Exclusionists: Pamphlet Literature in the Exclusion Campaign, 1679-81*, 13 *CAMB. HIST. J.* 19-36, 19 (1957).

³² For further details on the way in which the pamphlets were selected, see Chapter 4: *Pamphleteers: a brief explanation of nature and purpose*.

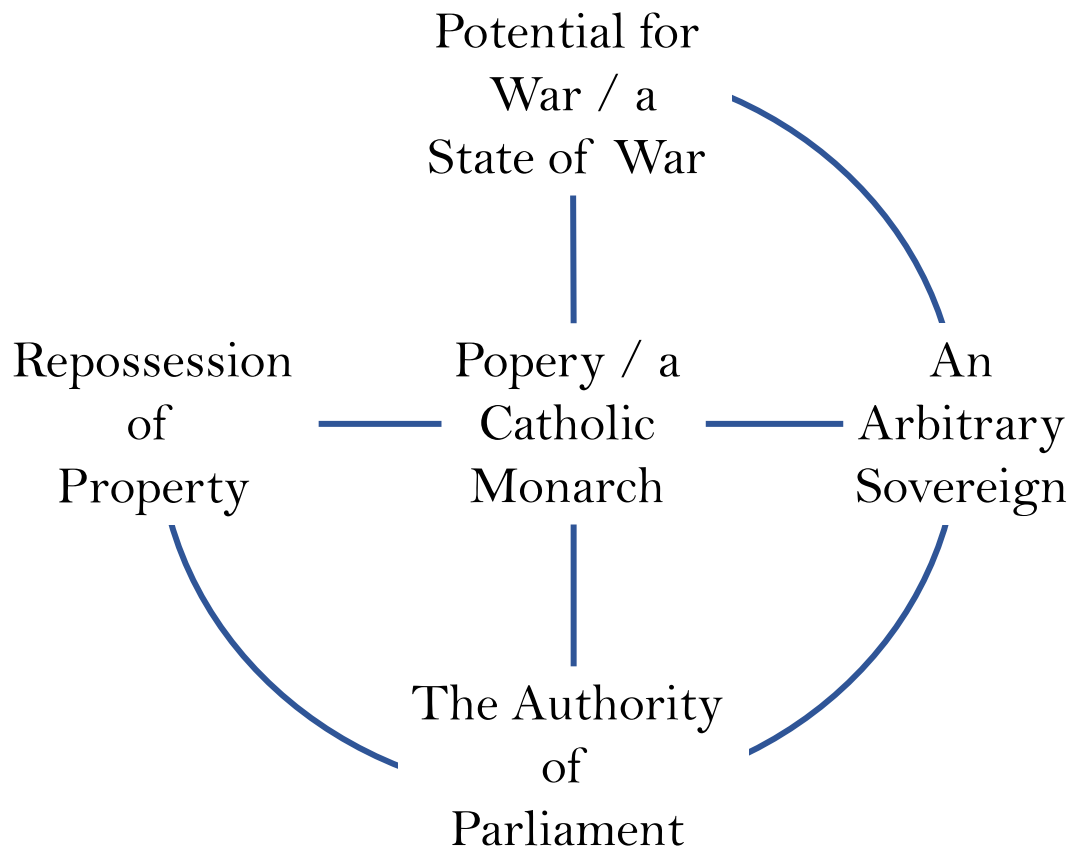


Figure 1.1 – The Authoring Period's Problem Wheel

The interrelationships between the problems—which will become apparent in the following subsections—are illustrated by the lines connecting the individual problems. These relate to conceptual connections between the problems which are, in turn, apparent from the pluralistic account included in most pamphlets; in short, there is rarely an instance where only one of these problems is discussed. The connections on the problem wheel are not simply

created by me for diagrammatic convenience; they are made by, and are reflective of, connections made by the pamphleteers themselves.³³

What is apparent from the diagram is that the fear of popery or a catholic monarch represents the core of the problems raised. The other problems are not commonly raised in relation to *all* of the other problems. Putting this another way, the other problems, whilst capable of existing independently as problems, are frequently and explicitly tied back to the core issue of popery. It is for these reasons that 'Popery / a Catholic Monarch' occupies the hub position to the other problems' spokes in the—near complete—problem wheel.³⁴ The similarity of the problem wheel to a sight-target, and the positioning of 'Popery / a Catholic Monarch' in the centre of the cross-hairs is also non-coincidental. One of the things that will be

³³ In illustrating these connections, I do not suggest I have illustrated *all* connections that are apparent or possible to make across the pamphlet literature. All I suggest is that the connections illustrated represent both popular and fundamental connections that can be readily identified.

³⁴ I state 'near complete' as—although it is not difficult to imagine a situation where the repossession of property can lead to a state of war—the connection is not frequently made or, at least, is not obviously made, in the pamphlets examined. The outcome of a state of war is suggested as an outcome by Locke. See, for example, LOCKE, *supra* note 4 at II, §192, 199, 221–222.

explored below is the use of the other problems to effectively target popery as a central problem; the other problems are used to focus on popery.

As a final point regarding the problem wheel, it is relevant to point out that the order in which I have listed these problems, does *not* have any significance; there is no 'start' point on the wheel. There is, based on the authoring period's pamphlets, no discernible pattern in which the problems come to prominence. The problems can be seen in the literature across the entire authoring period and most of the problems seem to be raised in broadly similar proportions across that time.

By aggregating the arguments' key points under only five problem-headings, and as was the case with my similar exercise regarding Hobbes, I do not suggest these are the only problems being discussed; there are certainly many others. I also do not suggest the problems identified within the cited pamphlets include all of the pamphlets that *could* have fallen within my Rule of Law criteria; there are doubtless others. I merely illustrate the most popular arguments. As my aim is to identify and evidence the general problems perceivable by Locke, my broad-brush approach and categorisation loses nothing.

Potential for War / a State of War

In circumstances where England had emerged from civil war within living memory, the prospect of a state of war—whether that be a civil war, a foreign war, or a hypothetical state of war (as discussed by, inter alia, Hobbes³⁵)—was never far from pamphleteers' consciousness. In response to the perceived Whig agenda that sought to encourage subjects to disobey the sovereign, it was suggested that the act of disobedience would itself result in a state of war.³⁶ Further, fears that the Whigs' attempted exclusion of James from the line of succession to the throne (via the Exclusion Bill) was suggested

³⁵ This is reflected in Hobbes's state of nature. See, THOMAS HOBBS, *LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668* XIII (E. M. Curley ed., New Ed edition ed. 1994). This, of course, includes the most famous statement of life during the inconveniences of war as involving 'continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short.' *Id.* at Ch. XIII, [9].

³⁶ Hobbes's state of war is specifically referenced by L'Estrange in making this point. ROGER L'ESTRANGE SIR, *AN ANSWER TO THE APPEAL FROM THE COUNTRY TO THE CITY* 31–2 (1679). Dryden's point, and invocation of Hobbes, is put this way: 'Then farewell the Good Act of Parliament, which makes it Treason to Levy Arms against the present King, upon any pretences whatsoever. For if this be a Right of Nature, and consequently never to be Resign'd, there never has been, nor ever can be any pact betwixt King and People, and Mr. *Hobbs* would tell us, *That we are still in a state of War.*' JOHN DRYDEN, *HIS MAJESTIES DECLARATION DEFENDED* 10 (1681). See also, ROBERT BRADY, *THE GREAT POINT OF SUCCESSION DISCUSSED* (1681). (Referenced by ASHCRAFT, *supra* note 16 at 293–4.)

as being likely to end in a civil war.³⁷ Conquest and ideas of invasion also come within this problem category (and here, there is a distinct overlap with the problems of arbitrary power and fears of popery). There were suggestions that James may seek to come to the throne through conquest, and that the Exclusion Bill may itself lead to a 'War of expediency'.³⁸ The fear of war also extended to external invasion by French forces as a consequence of James—as a catholic successor—being denied the throne.³⁹ This connection between war and both popery and arbitrary power, that forms an ever-present line of argument in Whig pamphlets, is clearly stressed in *The Character of a Popish Successor*, where it was suggested that popery may be restored by arbitrary power through an attempted conquest which must be repelled.⁴⁰ In terms where James's desire to exercise arbitrary power would necessarily provoke a war, it is stated:

³⁷ 'To endeavour so absolute a Subversion of our Government, if it be not Treason, is to design, if it be pursued, that which cannot but happen, Anarchy and Confusion, and all the Calamities of an unnatural Civil War.' ANON., ENGLANDS CONCERN IN THE CASE OF HIS R.H. 4 (1680).

³⁸ WILLIAM CAVENDISH DEVONSHIRE DUKE OF, REASONS FOR HIS MAJESTIES PASSING THE BILL OF EXCLUSION IN A LETTER TO A FRIEND (1681). Tarlton cites to the 'Letter to a Person of Quality' in relation to the quote. Charles D. Tarlton, *The Exclusion Controversy, Pamphleteering, and Locke's Two Treatises*, 24 HIST. J. 49–68, 67 (1981).

³⁹ CHARLES BLOUNT, AN APPEAL FROM THE COUNTRY TO THE CITY 6 (1679).

⁴⁰ ELKANAH SETTLE, THE CHARACTER OF A POPISH SUCCESSOUR 20 (1681).

... his temper, bred up in such principles in politicks, as made him in love with Arbitrary power, and bigotted in that Religion, which allewise propagates it self by Blood... would he not thereby have been provok't to the utmost fury and revenge, against those who laid them upon him? This would certainly have bread a contest, and these limitations of power proposed to keep up the Government, must unavoidably have destroyed it, or the Nation, (which necessity would have forced into a War in its own natural defence) must have perished either by it or with it.⁴¹

These examples, drawn from both sides of the political debate and from across the authoring period, illustrate that war—broadly conceived—was a problem that was raised, and debated, across the pamphlets.

Popery / a Catholic Monarch

Pamphlets' titles frequently made the authors' argumentative position very clear without the need to have recourse to the content. For example, *A Protestant Antidote Against the Poyson of Popery* provides a clear indication of both the perspective from which the argument is being made, and the issue being argued against.⁴² The idea that catholic influence was akin to a

⁴¹ WILLIAM JONES, *A JUST AND MODEST VINDICATION* 31 (1682). Tarlton also points to this pamphlet to illustrate a similar point. Tarlton, *supra* note 38 at 68.

⁴² CHRISTOPHER NESS, *A PROTESTANT ANTIDOTE AGAINST THE POYSON OF POPERY* (1679).

poison sums up, clearly, the Whigs' general position. As noted above, the problem of popery and catholic rule is commonly and invariably intertwined with the problems of war and arbitrary rule. In relation to arbitrary rule and popery, this occurs to the point that the two are often seen as being largely synonymous.⁴³ The interrelationship between the issues stems in one respect from the frequently stated assertion that catholic monarchs tend to rule by force and that without arbitrary government popery can never prevail.⁴⁴ Other interrelationships are apparent from pamphlets that associate popery with being a lawless and arbitrary power that will cause the sovereign to deprive subjects of land, liberty, and property.⁴⁵ However, the interrelationship is never clearer than in this example:

...if you think to bind and fetter him by Laws, that will be no better than the wise men of *Gotham's* hedging in the Cuckow; for when he (as all other Popish Kings do governs by an Army,

⁴³ '... [L]et us but rightly consider, how far the first Foundations of Popery, (viz. Arbitrary Power) may be laid in *England*.' SETTLE, *supra* note 40 at 8. See also, the close association in BLOUNT, *supra* note 39 at 10. ('However, I cannot but ascribe great part of our present Calamities, to his Highnesses Education in that Arbitrary and Popish Government...')

⁴⁴ BLOUNT, *supra* note 39 at 24.

⁴⁵ '...[T]he Canonists made all their Laws according to their own Arbitrary will, and observed the Civil Law only for their profit, and not when it made against them...' WILLIAM LAWRENCE, MARRIAGE BY THE MORALL LAW OF GOD VINDICATED 24 (1680).

what will all your Laws signifie? You will not then have Parliaments to appeal to; He and his Council will levy his arbitrary Taxes, and his Army shall gather them for him...⁴⁶

Further, more specific, problems relate to the fear that protestant subjects would be considered heretics and would be put to death under a catholic king.⁴⁷ In circumstances where Catholics condemn protestants as heathens and would threaten protestants' lives and properties, the Exclusion Bill is suggested to have been brought as a consequence of the nation's awakening to the dangers associated with England's heir being a catholic.⁴⁸ In relation to James taking over the throne as a catholic, reference is made to James's past disregard of laws to suggest he would be even less restrained in his contraventions on becoming king.⁴⁹ In all of these senses, popery or the placement of a catholic on the throne can be seen to represent the core problem in the authoring period's pamphlets.

⁴⁶ BLOUNT, *supra* note 39 at 4-5.

⁴⁷ DAVID CLARKSON, THE CASE OF PROTESTANTS IN ENGLAND 10-11 (1681). See also, GENTLEMAN IN THE CITY, A LETTER FROM A GENTLEMAN IN THE CITY 3 (1680). ('It is not only lawful for such a *Prince* to destroy those of his Subjects, who disagree from him in Faith and worship, but it is an indispensable Duty upon him to do it.')

⁴⁸ GENTLEMAN IN THE CITY, *supra* note 47 at 1-2.

⁴⁹ *Id.* at 9.

An Arbitrary Sovereign

The interrelationship between arbitrary government and other problems during the authoring period has already been mentioned. The quote extracted above in relation to the problem associated with a state of war reflects the emphasis on the exercise of arbitrary power as being, in effect, the end result of other characteristics and circumstances.⁵⁰ It seems, in this respect, arbitrary power—as the means by which power is to be exercised—is both the result of other problems and a facilitator of problems, as well as a specific problem in itself.⁵¹ And, furthermore, the suggestion that the arbitrary will of canonists will be employed to the detriment of civil laws also illustrates this fear of arbitrary rule.⁵² This sentiment is also apparent in the *Defence of the Charter*, where it is stated:

... they Act and manage, and engage in courses, which tend to their own and the publick ruin, with an utter neglect of Rights, Laws, and antient constitutions; nay, they endeavour to subvert them all, that they may more certainly and speedily arrive at the mischiefs designed by our Enemies.⁵³

⁵⁰ See note 41 and associated text.

⁵¹ Arbitrary power could in some senses also be seen as part of a solution; the Whigs' appreciation of the papists' position puts arbitrary power as a solution.

⁵² LAWRENCE, *supra* note 45 at 34.

⁵³ THOMAS HUNT, A DEFENCE OF THE CHARTER 17–18 (1683).

Whilst it is the case that arbitrary rule was problematised on its own terms, it is also clearly interconnected with absolute government: the suggestion that absolute government itself is not properly a government was raised by Penn;⁵⁴ and, the problems associated with the existence of arbitrary government is also discussed by Neville.⁵⁵ The question of succession and lawfulness is also directly challenged by Settle in questioning how an 'Arbitrary absolute Popish Tyrant' can be a lawful successor to an established and bounded government in circumstances where he [sic] 'violently, unlawfully, and tyrannically overruns the due bounds of power' in circumstances where this would mean the people would be required to:

[S]ubmit to such an Arbitrary Majesty, to have their *Magna Charta* abolisht, their Religion and Liberties destroyed, and to have Popery and Arbitrary power set up, and yield to have the Right of Lords and Commons extirpated, and all devolve into the King...⁵⁶

This problem was further explained by the fear that James's previous efforts to subvert the laws whilst merely an heir to the throne would, on gaining the throne—and becoming legally capable of doing no wrong—cease

⁵⁴ WILLIAM PENN, ENGLANDS GREAT INTEREST 2 (1679).

⁵⁵ HENRY NEVILLE, PLATO REDIVIVUS 18–19, 38–39 (1681).

⁵⁶ SETTLE, *supra* note 40 at 20.

to be fenced by the laws and would redouble his efforts to subvert the protestant religion.⁵⁷

In addition to these issues, the idea of arbitrary rule can also be seen to encompass a cognate idea: the fears associated with a standing army. This idea was prevalent in Shaftesbury's own pamphlet,⁵⁸ as well as in a speech to parliament where he pointed to the dangers of granting the King funds where his allegiance is in question and in relation to the raising of an army.⁵⁹ This is no better summed up than in the phrase—already extracted above—that when he '... as all other Popish Kings do governs by an Army, what will all your Laws signifie?'⁶⁰ When considered together with the other aspects of arbitrary rule, it is clear that the problem is one that was raised, and addressed in varying ways, across the pamphlet literature.

⁵⁷ GENTLEMAN IN THE CITY, *supra* note 47 at 3.

⁵⁸ EARL OF SHAFTESBURY - ANTHONY ASHLEY COOPER, A LETTER FROM A PERSON OF QUALITY 18-19 (1675).

⁵⁹ EARL OF SHAFTESBURY - ANTHONY ASHLEY COOPER, A SPEECH LATELY MADE (1681).

⁶⁰ BLOUNT, *supra* note 39 at 4-5. For a similar sentiment, see SETTLE, *supra* note 40 at 8-9.

The Authority of Parliament

One of the most fundamental aspects of the Whig argument was centred on the ability of parliament to govern as a representative institution that functioned through the consent of the people. In this respect, these arguments also extended to suggestions that the dissolution of parliament by the King—in the context where Charles II used the dissolution of parliament to prevent the passage of the Exclusion Bill—was contrary to the principles for which government was established.⁶¹ Attempts were made by the Whigs to suggest that consent through parliament was opposed to various other fears like arbitrary government, a standing army, or rule by catholic monarchs.⁶² In these respects, the necessity of parliament to the Whig approach was clear from their holding the institution out as a bulwark against the arbitrary and popish tyrant that was represented by James.⁶³ Yet, there existed a fear that parliament with a catholic King would be impossible. Clarkson sums this up by posing and answering a simple question:

⁶¹ ANON., *VOX POPULI, VOX DEI* (1681).

⁶² BLOUNT, *supra* note 39 at 4–5.

⁶³ SETTLE, *supra* note 40 at 14–15. See also, the comment that it is ‘Charters, and Governments of municipal Cityes and Towns, (which are the greatest defences against *Popery*...)’ in HUNT, *supra* note 53 at 13.

But may not Parliaments secure us by Laws and Provisions
restraining the Powers which endanger us?

There is nothing of this tendency can in reason be expected from
Parliaments, *without securing the Throne*... [The papists] are for
another Government, in which the *Pope* must be Supreme, and
to which our Kings must be *subjected or kill'd*.⁶⁴

The basic point was that parliament, unlike a popish sovereign, would
not assume greater power, and that property owners would not lose their
estates.⁶⁵

There were, of course, also arguments against the Whig position.
Some of the most prominent related to the divine right theory of government,
the inability of institutions like parliament to be truly representative, and the
fact that parliament's rights were relatively recently established.⁶⁶ What is,

⁶⁴ CLARKSON, *supra* note 47 at 30.

⁶⁵ PHILOLAUS, A CHARACTER OF POPERY AND ARBITRARY GOVERNMENT (1681). (Cited in
ASHCRAFT, *supra* note 16 at 250.)

⁶⁶ MATTHEW RIDER, THE POWER OF PARLIAMENTS IN THE CASE OF SUCCESSION (1680);
ANON., THE INTEREST OF THE THREE KINGDOMS (1680); M. R., THREE GREAT QUESTIONS
CONCERNING THE SUCCESSION AND THE DANGERS OF POPERY (1681). See also, JOHN
NALSON, THE COMPLAINT OF LIBERTY & PROPERTY AGAINST ARBITRARY GOVERNMENT
(1681); ANON., AN IMPARTIAL ACCOUNT (1681); PAUL LATHOM, THE POWER OF KINGS
FROM GOD (1683). The Whig argument that sparked many of the responses is
WILLIAM PETYT, THE ANTIENT RIGHT OF THE COMMONS OF ENGLAND ASSERTED (1680).

however, clear is that a considerable part of the debate in the authoring period can be attributed to the relative popularity of Filmer's arguments. Although Filmer's theory on the divine right of kings had been popular during the Civil War, and brief mention was made in the context of the problems that Hobbes could perceive, it received renewed interest in the Lockean authoring period. This interest included the publication of his *Patriarchia* and the *Free-holders Grand Inquest*, in 1680.⁶⁷ It has been suggested that Filmer's theory—that sovereigns' authority was derived, by direct lineage, from the authority Adam exercised in the garden of Eden, and reflects patriarchal power in the familial home—was not only taken seriously, but also caused Locke to cease working on his general theory of government (in the *Second Treatise*) and to focus on the specific refutation of Filmer's idea (in the *First Treatise*).⁶⁸ Whilst the order of Locke's authorship is unclear, it is clear and

⁶⁷ Robert Filmer, *Patriarcha*, in PATRIARCHA AND OTHER WRITINGS 1–63 (J. P. Sommerville ed., 1991); ROBERT FILMER SIR, THE FREE-HOLDERS GRAND INQUEST (1648). See also, in relation to publication and authorship dates, Cesare Cuttica, *Reputation versus Context in the Interpretation of Sir Robert Filmer's Patriarcha*, 33 HIST. POLIT. THOUGHT 231–257, 233–234 (2012). In relation to Filmer's earlier published works—in, for example, late-1648—see Filmer, *supra* note 13.

⁶⁸ Laslett suggests that the *Free-holders Grand Inquest* did not require a general discussion of patriarchalism or the origins of government. See, LOCKE, *supra* note 4 at 57–59. Laslett's ordering of authorship of the *Two Treatises* is debated. See, ASHCRAFT, *supra* note 15 at 289–95, 298–305.

uncontroversial that, during the Exclusion Crisis, Filmer was in vogue, and required a serious response.⁶⁹ Whig efforts were focused, in no small part, on dealing with the problem of the authority that was suggested as accruing via the divine right of kings, with their own argument regarding the authority of parliament via the consent of the people. It is no coincidence that the two aspects of this problem suggest a structure of solution that is eventually adopted in the *Two Treatises*.

Repossession of Property

One problem that was continually expressed and impressed in the pamphlet literature was the suggestion that a popish sovereign would lay claim to individuals' property. During this period, the widely construed idea of property was taken to include not only material things; it related to individual's lives, liberties, and estates. The perceived threat also extended to the property of others as there was also a fear that a catholic king would facilitate reclamation of the abbey lands that were confiscated at the start of the Reformation.⁷⁰ Prior takings of property outside of England by catholic rulers are cited as being evidence or authority for the suggestion that the

⁶⁹ LOCKE, *supra* note 4 at 47.

⁷⁰ L'ESTRANGE, *supra* note 36 at 36-37.

same will happen should a catholic monarch take the throne in England.⁷¹

These Whig arguments did, it is alleged, obtain some purchase. James himself sought to assuage fears and insisted that it was his intent to defend and protect property.⁷² This idea was also frequently put into comparative terms: subjects' property rights under a catholic monarch are impoverished in comparison to those under a protestant monarch.⁷³ In circumstances where Whigs point clearly to these fears, it is of no surprise that they then also suggest that parliament is held out as an effective security against the loss of individual's lives, liberties, and estates.⁷⁴ Reference to popish rule (as a threat to property) and the authority of parliament (as a defence to property reclamation) represent the two most fundamental interconnections that can be seen in the pamphlets.

⁷¹ GENTLEMAN IN THE CITY, *supra* note 47 at 2. ('Nor... can the *Papists* themselves Condemn us for taking these due ways and Methods to secure our Religion, and preserve our Lives and Properties; seeing they are not only agreeable to the Measures, (but much more modest) which they have taken in Forreign Countries to preserve their own.') See also, C. B., AN ADDRESS TO THE HONOURABLE CITY OF LONDON 2 (1681).

⁷² Furley, *supra* note 31 at 24.

⁷³ GENTLEMAN IN THE CITY, *supra* note 47 at 3; CLARKSON, *supra* note 47 at 22.

⁷⁴ JONES, *supra* note 41 at 16-17.

Why the Problems are Rule of Law-like Problems

Each of the problems can be conceived as falling within the broad definitions of the Rule of Law adopted: either within the normative force conception, or as including the Rule of Law elements. In considering the problems, and the problem wheel in Figure 1.1, one thing that is apparent is that the problems are of a different nature: process-related problems; a defence problem; and, an outcome problem. The problem related to a state of war is an outcome problem. This outcome is what results when parliamentary authority—as a defence-problem—is insufficient to prevent the process-related problems—of repossession of property, the existence of an arbitrary sovereign, and the influence of popery / a catholic monarch—from occurring.⁷⁵ Accordingly, the problem wheel can be further segmented into three rows that illustrate the nature of each problem:

⁷⁵ The classification of 'Popery / a Catholic Monarch' problem as a process-problem, together with the other two process-problems does not impact the earlier classification of the Popery problem as the central focus of the pamphlets. Nor does it impact the classification of the other two process-problems that can be, as stated earlier, conceived to exist independently.

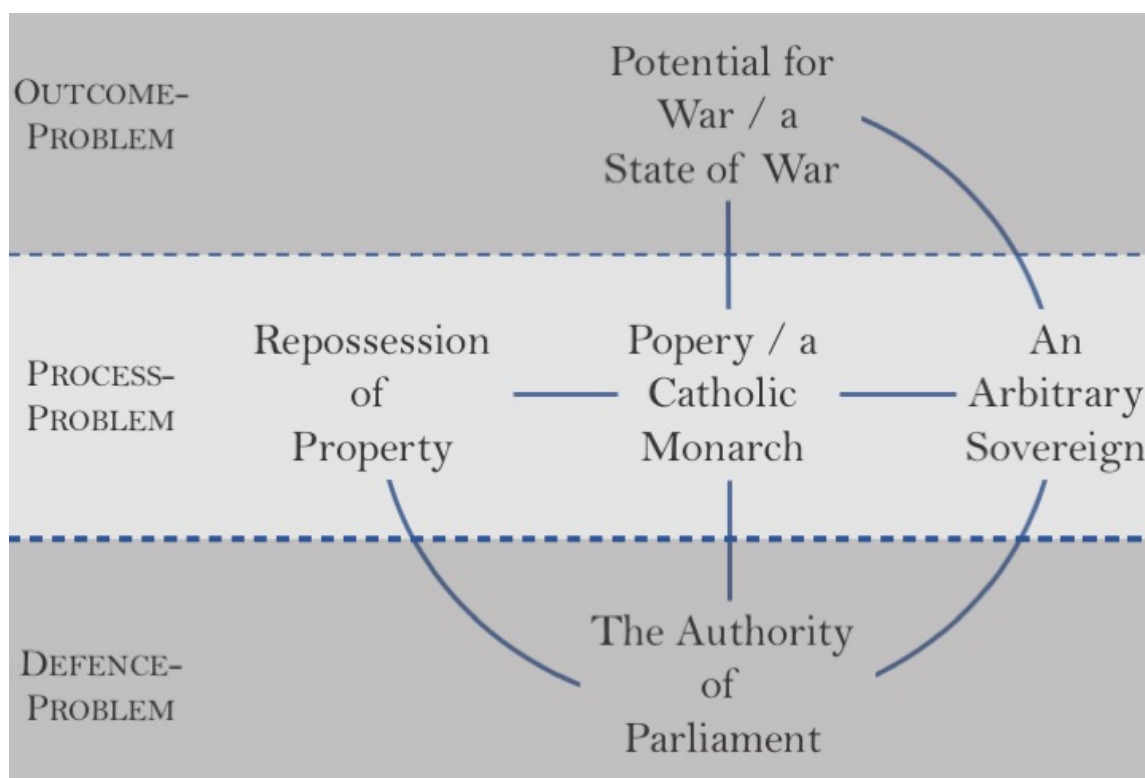


Figure 1.2 - Problem Wheel's Problems' Nature

I outline why each problem is a Rule of Law-like problem by considering whether the problems, in terms of their nature, can fall within the normative force conception or the Rule of Law elements.

Process-Problems: Popery, Arbitrariness, and Property Repossession

As the problems all, to some degree, relate to the problem of popery / a catholic monarch, it is most sensible to start at that point. In terms of the Rule of Law elements, the pamphlets raise questions related to the idea of whether an individual can comprehend the rules to which he or she is subject. Individuals cannot comprehend the rules if the rules are not being made by

the King or other identifiable sovereign, and they are instead—and perhaps covertly—being made through popish influence, then this reflects an absence of procedural pellucidity. This problem, for these two reasons, is a Rule of Law-like problem in terms of the Rule of Law elements.

The perceptions expressed in the pamphlets reflect a fear of some form of external control or influence over the sovereign—whether this be by the Pope, or by external forces from catholic nations (like France). The problem associated with this external influence is Rule of Law-like as this may obviate the operation of any normative force conception; an external power may not be subject to any normative force that may operate on an internal sovereign.⁷⁶ The imposition of the will of this external power would, itself and for this reason, be seen as being arbitrary in nature—which would both run against the idea of the normative force conception and would reflect the next problem explored: an arbitrary sovereign.

A problem relating to the fear of an arbitrary sovereign is the most obviously Rule of Law-like problem. The idea of arbitrariness makes up a component of most Rule of Law ideas and, more specifically, is included as part of the normative force conception. Furthermore, an arbitrary command is

⁷⁶ This point is directly related to the authority of parliament problem explored below.

not properly something that can be comprehended or be one that is subject to clearly communicated procedures. This relationship, particularly where a sovereign is making arbitrary decisions outside of the normally accepted parliamentary procedure,⁷⁷ illustrates that the idea of an arbitrary sovereign falls within the compass of ideas relating to both of the Rule of Law elements.

The final process-problem relates to the seizure of property. The problem in the pamphlets reflects the fear that there will be little rationale or process associated with any seizure. This clearly reflects a relevance to procedural pellucidity, as well as a lack of comprehension regarding the rules to which individuals are subject. In short, there is, regarding the situation following a catholic monarch taking the throne, little certainty or predictability that property will be secure. In common with the idea of a catholic being on the throne, there seems to be no way that normative force can operate in these terms. It is also the reason that parliament is put forward—by the Whigs at least—as a defence to these problems.

⁷⁷ The authority of parliament is dealt with below in relation to defence-problems.

Defence Problem: Parliament's Authority

Parliament's authority is suggested as a defence against the operation of arbitrary power, the impact of a popish influence, and the repossession of property. In this sense, and where each of those problems is Rule of Law-like, the problems raised regarding parliament's authority is—by association—also properly conceived as being Rule of Law-like. There is, however, a more direct relationship. Parliament is frequently suggested—in Whig pamphlets—as being an effective defence by way of its grounding in consent. Consent and the parliamentary process reflect the ideas inherent in the Rule of Law elements—establishing both procedural processes and facilitating comprehension of those processes—as well as creating a structure through which normative force can operate. For these reasons, it is clear that the defence offered by the Whigs—and, for that matter, the criticisms of parliament's authority mounted by the opposing Tories—can be seen as a Rule of Law-like problem.

Outcome Problem: Potential for War

As noted above, the potential for war was, possibly as a result of the recently concluded Civil War, an extant theme across the authoring period. In this sense, the potential for war existed as a problem independent of the

other problems. Whilst the same rationale of being Rule of Law-like can be applied to the problem as an independent problem, it is its existence as an outcome on which I focus. The interconnections in the pamphlets make it clear that a state of war can result from both a popish or an arbitrary sovereign being in power. It is also relevant to note that the Tories see that a state of war would follow from the disobedience of the sovereign's commands; whereas, the Whigs take the view that a state of war follows when the sovereign rules arbitrarily (and they associate all popish rulers with this form of Rule). The problem could also be seen as relating to the *causes* of a state of war that could, for example, relate to an external invasion by (catholic) France. Once again, the Rule of Law-relation here comes back to the connections with popery and arbitrary rule and the lack of a normative force that may operate. In short, any of the Rule of Law-like problems can result in the problem of a state of war. In this sense, these connections import the Rule of Law relevances noted above.

LOCKE'S RULE OF LAW IN CONTEXT: A SOLUTION AND ITS PROBLEMS

Through recourse to popular pamphlets, I have outlined the nature of the Rule of Law-like problems perceivable by Locke. Through outlining Locke's relationship with Shaftesbury, I have also illustrated—by virtue of Shaftesbury's request that Locke assist him in providing a theoretical

argument to justify a change in the constitution and Locke's immersion in the political controversies of the age by virtue of his relationship with Shaftesbury⁷⁸—why Locke was likely to have been intimately aware of these problems.⁷⁹ One thing that I have not pointed to, is the suggestion that at some stage between 1682-83, Shaftesbury commissioned several versions of a manifesto outlining a declaration of principles for the burgeoning revolutionary movement.⁸⁰ Locke's account was both produced around the same time and could be seen as a response to Shaftesbury's request.⁸¹ In this sense, what has been seen as a populist resolution of the problem of how the people should re-appropriate their political power through a revolution,⁸² could also be seen as a response to Shaftesbury's request to state the principles of the revolutionary moment. My claims—that Locke provides a solution to, *inter alia*, the problems outlined in the part above—hold

⁷⁸ LOCKE, *supra* note 4 at 31; ASHCRAFT, *supra* note 15 at 28.

⁷⁹ Whilst detailed studies have been conducted into Locke's library and reading records, I do not need to establish that Locke actually read any of the pamphlets cited. For my argument, it is sufficient that the pamphlets reflect the problems in society and Locke, by virtue of being part of that society, is capable of perceiving those problems.

⁸⁰ ASHCRAFT, *supra* note 16 at 391-392.

⁸¹ Other responses received by Shaftesbury are now either lost or are no longer studied or seen as relevant.

⁸² THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, *supra* note 18 at 618.

regardless of which account is correct; the purpose for his drafting the document is of no consequence (to my argument). In a more focused sense, I simply claim that Locke's *Two Treatises* provides a Rule of Law-like solution to the Rule of Law-like problems identified above. Accordingly, in this part I merely illustrate the way in which Locke's responses can be seen to respond to the problems.

Locke's Rule of Law reflects and responds to the problems identified. Even the briefest consideration of the *Second Treatise*—for example, by examining the table of contents—suggests close links between the problems and Locke's focus. Chapters entitled 'Of the State of War', 'Of Property', 'Of Paternal Power', 'Of the Extent of the Legislative Power', and 'Of Tyranny' parallel the problems identified. These connections become more obvious when Locke's work is examined in more detail. To take one chapter as an example, his account of the dissolution of government mirrors precisely the problems I have identified. Within his chapter—in circumstances where it is clear that he is describing the constitution of England⁸³—he sets out two broad bases on which government can be dissolved. The first, Locke splits into various sub-topics that relate to the arbitrary will of the sovereign, a

⁸³ LOCKE, *supra* note 4 at II, §213. (See Laslett's note in relation to this paragraph that also takes this view.)

sovereign's interference with parliament, and the delivery of subjects into the subjection of a foreign power;⁸⁴ the second, relates to a sovereign acting contrary to the trust placed in that sovereign, which includes attempts to invade the property of a subject.⁸⁵ Locke then states, in the next paragraph, that a state of war will follow if a sovereign acts in this way.⁸⁶ In the context of my earlier outline of the problems, and even without more explanation regarding his arguments, Locke's characterisation of the dissolution of government in these terms—as a break-down in the operation of government itself—clearly reflects both the problems that I have outlined, and a close connection to the political and constitutional situation in England at the time he was writing. Whilst these brief illustrations evidence a close connection between the problems and Locke's solutions and illustrate my argument precisely, the picture becomes more vivid when the solutions to each of three

⁸⁴ *Id.* at II, §212-217.

⁸⁵ *Id.* at II, §221. In considering these passages, I am conscious that Laslett holds the opinion that paragraphs 219 and 220 may have been written outside of the authoring period, in 1689. Their general omission would explain, to some extent, the difficulty in reconciling the 'secondly' at the start of paragraph 221. Laslett suggests this may follow from the 'First' in paragraph 212. If—what are now paragraphs 219 and 220—are omitted, Locke's description of a first and second point makes more sense.

⁸⁶ *Id.* at II, §222.

problem natures illustrated in Figure 1.2 above—Outcome, Process, and Defence Problems—are explored and considered.

Locke's Solutions to Process Problems

Process problems relate to popery, property, and arbitrary rule. The core problem on the problem wheel, popery, is not directly addressed head on in the *Second Treatise*. However, as will be seen, it is both collaterally and synonymously addressed. There is, however, a focus on the impact and understanding of religion—at least where it is suggested as grounding sovereigns' divine rights—in the *First Treatise*, where Locke provides a line by line refutation of Robert Filmer's *Patriarchia*.⁸⁷ Locke's focus on the dangers of popery can be seen in the *Second Treatise* through the idea of a conquest by a foreign power. His focus refers to the influence of the pope and Catholicism over England. This is the case where, at that time, the papacy could legitimately be considered to be a foreign power,⁸⁸ or where it was believed—at least by Locke and his contemporaries—that Catholics were held within a tyrannical relationship by and to the Pope in exercising absolute power.⁸⁹ This interpretation—in the context of the societal turmoil during the authoring

⁸⁷ Filmer, *supra* note 67.

⁸⁸ ASHCRAFT, *supra* note 15 at 215.

⁸⁹ *Id.* at 25.

period and considering the ways in which government can be dissolved—is certainly open on consideration of Locke's comment that: 'The delivery also of the People into the subjection of a Foreign Power, either by the Prince, or by the Legislative, is certainly a *change of the Legislative*...'.⁹⁰ It is in this sense that Locke's responses to the threat of Catholicism are to be examined.⁹¹ The operation of an arbitrary sovereign also provides a closely related problem in circumstances where catholic rule was so frequently equated with arbitrariness.⁹² The connection is relevant because, as will be seen, Locke often brings together absolute and arbitrary power.⁹³ The merging of issues relating to a popish, arbitrary, and absolute sovereign in the problems expressed in the pamphlets during the authoring period—that is illustrated by the interconnections on the problem wheel—is also mirrored in Locke's *Second Treatise*. In these circumstances, it is unsurprising that Locke does not offer a clear-cut answer to each problem and, instead, provides responses that address the problems as an interconnected group. It is, however, clear

⁹⁰ LOCKE, *supra* note 4 at II, §217. (Cf Laslett's note re this point in which he suggests Locke may not have been referring to Charles II.)

⁹¹ I will return to this point in relation to Locke's solution to the outcome problem (the potential for a state of war).

⁹² See the section Popery / a Catholic Monarch, above.

⁹³ In relating the nature of despotical power, see LOCKE, *supra* note 4 at II, §135, 137. And, see *Id.* at II, §23, 64, 189. Regarding the act of governing without standing laws, see, *Id.* at II, §172.

that the Rule of Law-like solution provided—as a rationale for the way in which an errant government can be replaced without a break in society’s general governance—does address all of the process problems.

Other process problems are easier to locate. During a discussion of tyranny, Locke states: ‘*Where-ever Law ends, Tyranny begins...*’ and goes on to detail that the extra-legal actions of a king are no more excusable than those of a lesser individual.⁹⁴ A similar point is made when discussing the dissolution of government: both foreign and domestic attempts to take the properties of any people—thus putting oneself in a state of war—can be resisted and the invader’s station has no impact on the appropriateness of this action.⁹⁵ These comments closely reflect some of the fears expressed as part of the problem of arbitrary rule and, more specifically, the fear that James would, if crowned and once he was considered as being incapable of breaking the law, give even less regard to the laws. This is also clear when Locke sets out the extent of legislative power and states that this cannot be exercised arbitrarily or through arbitrary degrees, and must, instead, rule by ‘*promulgated standing Laws, and known Authoris’d Judges*’.⁹⁶ He goes on to

⁹⁴ LOCKE, *supra* note 4 at II, §202.

⁹⁵ *Id.* at II, §231-232.

⁹⁶ *Id.* at II, §136.

say, in circumstances where the people consent to being governed, it cannot be supposed they intended to confer arbitrary power as the exercise of the (conferred) power must be limited to purposes that promote the public good.⁹⁷ It is in these sections that Locke sets out, in detail and repeatedly, an argument that is a clearly recognisable Rule of Law-like position. He later summarises these and adds that the government must not interfere with property—through taxation—without consent, and describes this control in terms of the '*Bounds...set to the Legislative Power*'.⁹⁸ Once again, it is clear that Locke is not only responding to the problem of rule by an arbitrary sovereign, but is doing so in a fashion that relates to the way the problems were stated during the authoring period: namely, the perceived fear that Charles and James would rule without parliament—as occurred in the context of the dissolutions of parliament during the Exclusion Crisis—and that society would be governed in a way that did not acknowledge or respect the need for the people's consent.

The final process problem relates to property. It is, of course, well known that the *Two Treatises* is, in large part, focused on providing an

⁹⁷ *Id.* at II, §135-139. See also, a brief definition of tyranny in the chapter devoted to the same: *Id.* at II, §199.

⁹⁸ LOCKE, *supra* note 4 at II, §142.

argument for the defence of private property against government intervention and reclamation.⁹⁹ Locke provides an expansive idea of property in which the concept is constituted by individuals' 'Lives, Liberties, and Estates'¹⁰⁰ and describes the preservation of property as '[t]he great and *chief end*...of Mens uniting into Commonwealths, and putting themselves under Government...'¹⁰¹ Notwithstanding this more general focus of the work, Locke also has a chapter 'Of Property', that is suggested as being focused on Filmer's argument that was made popular during the authoring period.¹⁰² In circumstances where preservation of property—in Locke's broadly defined sense—is the end of government, property clearly cannot be taken without consent.¹⁰³ If this occurs, then the government is arbitrary and is in state of war with its subjects,¹⁰⁴ revolution or rebellion may justifiably follow abuses of

⁹⁹ In opening the *Second Treatise*—in the first paragraph in which he is not referring back to the contents of the *First Treatise*—Locke introduces his argument in this way: 'Political Power then I take to be a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property... and all this is only for the Publick Good.' *Id.* at II, §3.

¹⁰⁰ *Id.* at II, §123.

¹⁰¹ *Id.* at II, §124. See the similar sentiment at *Id.* at II, §222. See also, in relation to the idea that property is not secure in more primitive societies, *Id.* at II, §94.

¹⁰² See Laslett's notes to lines 16-19 of paragraph 25. LOCKE, *supra* note 4 at II, §25. (This is, of course, in addition to the specific refutation of Filmer in the *First Treatise*.)

¹⁰³ *Id.* at II, §138.

¹⁰⁴ *Id.* at II, §221-222.

property if this follows 'a long train of Abuses, Prevarications, and Artifices.'¹⁰⁵

The road to revolution or rebellion that Locke described closely mirrors the problems of the authoring period; the long train of abuses, and the fear that property would be taken is illustrative of Charles's actions in attempting to subvert parliamentary authority and the fear that a popish ruler would, as catholic monarchs had in other places, seek to repossess various individuals' property (in the narrow sense) and may, by virtue of being in a state of war with heretic protestant subjects, seek their death or at least would take away their liberty (relating to property in the wider sense). In this regard, the Rule of Law-like process problems from the authoring period are clearly answered in terms that suggest, given the actions of the sovereign, that rebellion is either likely or justified.

Locke's Solutions to the Defence Problem

The authority of parliament is suggested by Whig pamphleteers as a defence against the process problems; in turn, and in opposition, parliament's authority was questioned by the Tories. The problem that existed could be said, therefore, to relate to the proper extent of parliament's authority. When it is kept in mind that Locke was active in the Whig party, and

¹⁰⁵ *Id.* at II, §225.

he echoes many of Shaftesbury's—arch-Whig—positions, it will be of no surprise that pro-parliamentary authority positions not only constitute one of the fundamental points of the *Second Treatise*, but also that the concept is peppered throughout his work.

Locke's view is that parliament's authority is grounded in consent: the government cannot oblige any action where consent is absent.¹⁰⁶ The nature of this consent, that political society will be joined, and government created, for the *purpose of the common good* is fundamental to this position.¹⁰⁷ The corollary of this position means that power cannot be exercised for the destruction of the people.¹⁰⁸ Further, people can only transfer to the government powers that they themselves held in a pre-political society.¹⁰⁹ It is in these senses that the King's authority is given to him by the law.¹¹⁰ It is also suggested that it is the function of civil society—in responding to and

¹⁰⁶ *Id.* at II, §199. See also *Id.* at II, §142.

¹⁰⁷ LOCKE, *supra* note 4 at II, §131, 138.

¹⁰⁸ *Id.* at II, §229.

¹⁰⁹ *Id.* at II, §135. This is an argument given for the reason why arbitrary power—which did not accrue to an individual in the state of nature—could not be a power transferred to the government; hence why the exercise of arbitrary power was outside of any consent and, therefore, outside of the common good. See, also *Id.* at II, §137.

¹¹⁰ LOCKE, *supra* note 4 at II, §206.

reflecting the consent granted to the government—that allows us to distinguish proper government from absolute monarchy.¹¹¹ Locke's account in the *Second Treatise*—not to mention his refutation of Filmer's divine right theory in the *First Treatise*—attempts to provide an account that justifies why individuals should treat government—and, within government, parliament (as government's supreme authority)—as being authoritative. In circumstances where the Tories argued that the King was supreme and should be able to dictate to the parliament, the question of parliamentary authority—over both the people and the King—was a fundamental problem to which Locke responded with a simple idea: the people's consent, given when joining or being part of civil society, provides the necessary authority and, crucially, the necessary constraint, on the exercise of power. This last part is not only important in terms of the Rule of Law-like-ness of the point, but also to differentiate the idea from the Tories' divine right idea that the King was all-powerful and, therefore, power *could* be exercised arbitrarily as there was no

¹¹¹ *Id.* at II, §90. Locke suggests that 'the *end of Civil Society* [is] to avoid, and remedy those inconveniences of the State of Nature...' which formulates the claim related to the protection of property in a slightly different—although not at all inconsistent—way. See also Laslett's comments to this effect *Id.* at II, §100.

constraint on what could be done.¹¹² Accordingly, Locke's response to the problem allows not only the Whigs' point to be rationalised, but also provides a Rule of Law-like constraint on the exercise of arbitrary power as one of the fundamental problems of the period.

Locke's Solutions to the Outcome Problem

The outcome of a failure of parliamentary authority to check the way in which arbitrary or popish rulers, *inter alia*, seek to take individual's property is a state of war. The fact that revolution may follow any attempts from the government to take property without consent has already been noted.¹¹³ It seems likely that it is this aspect of Locke's work that caused it to be considered as a justificatory work following the Glorious Revolution. This seems to be especially the case in the context where, on Locke's account, acting against the sovereign does not operate so as to endanger the institution of government.¹¹⁴ Locke's account could, post-Glorious Revolution, be seen as a way to legitimise the continued existence of the government;

¹¹² This brings to mind the problem of infinite-regress often associated with a Hobbesian style sovereign; that, if another authority existed that could constrain the sovereign, it would be that other authority that would, in fact, be sovereign.

¹¹³ LOCKE, *supra* note 4 at II, §222-226. See also, *Id.* at II, §232. In relation to opposing unlawfully exercised authority, see *Id.* at II, §204-206.

¹¹⁴ LOCKE, *supra* note 4 at II, §207.

however, the text was not written for this purpose,¹¹⁵ and could not have been given the period in which it was authored.

Locke considers the arbitrary exercise of power operating so as to, inter alia, seize individuals' property in the context where a parliamentary institution could not operate so as to defend against those problems. In providing this summary of the problems, there is no way to distinguish whether the 'Locke considers' aspect refers to the extant situation in Locke's state of nature, or the actual contextual situation in which Locke was writing in England during the authoring period. This simple exercise illustrates clearly the problems' operation as a connective tissue between Locke's philosophical or theoretical account and the practical political reality that he faced. Locke's simple assessment of the situation is that a state of war exists when an absolute, arbitrary, power is exercised by one man over another to take away his property whenever he pleases.¹¹⁶ A more specific contextual relationship of the problem and solution also exists: a situation of war exists between ruler and ruled when parliament is repeatedly dissolved.¹¹⁷ Locke, however, must work to ensure that it is understood that the state of war does not mean a

¹¹⁵ Although, of course, it may have been *published* for this purpose.

¹¹⁶ LOCKE, *supra* note 4 at II, §172. See also, *Id.* at II, §176, 199, 202, 222.

¹¹⁷ This has been suggested as being a reference to James. See, LOCKE, *supra* note 4 at II, §205. See also, *Id.* at II, §155.

total end to civil society and a return to the state of nature on a wholesale basis and, instead, constitutes a change to the structure of the Legislative.¹¹⁸ This is apparent in various places,¹¹⁹ but none more so than in the final sentence of the *Second Treatise* in which he states:

Or else when by the Miscarriages of those in Authority, it is forfeited; upon the Forfeiture of their Rulers, or at the Determination of the Time set, *it reverts to the Society*, and the People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place it in new hands, as they think good.¹²⁰

In making this comment, Locke neatly sums up the contextual aims of the Whigs in responding to the problems outlined in the pamphlets of the authoring period. In considering the outlines provided above, this could also be put into these terms: when there has been arbitrary rule of subjects—that may follow from popish influence—and where property is sought to be taken, a state of war exists between the ruler and the ruled which reconstitutes the sovereign power in society. In considering this summary, the Rule of Law-like aspects of Locke's *Two Treatises* can clearly be seen as being capable of providing a solution to the Rule of Law-like problems that have been

¹¹⁸ LOCKE, *supra* note 4 at II, §213-217.

¹¹⁹ *Id.* at II, §207.

¹²⁰ *Id.* at II, §243 (italics in original).

identified in the pamphlets of the authoring period. One question, however, remains: does the interpretation of Locke's account in this way facilitate a different understanding of the Lockean position that is generally taken to be 'Locke's Rule of Law'?

CONCLUSION:

'LOCKE'S RULE OF LAW': NOT LOCKE'S RULE OF LAW

Earlier in this chapter, I set out what 'Locke's Rule of Law' is commonly taken to be: a conception that is opposed to the arbitrary imposition of power.¹²¹ Before even considering other Lockean Rule of Law-like ideas like '*established and promulgated laws*', '*declared and received laws*', '*stated rules*', and '*settled standing laws*',¹²² it is relevant to pause and consider the basic problem of arbitrariness that is 'Locke's Rule of Law'. This popular position of arbitrariness underappreciates the complexity of Locke's Rule of Law when his statement of ideas in the *Two Treatises* is considered in context. In this concluding part, I outline why this is the case. First, however, I must provide a quick caveat. In relation to the formulation of 'Locke's Rule of Law' I do not suggest that the authors that have used Locke in this way fail to

¹²¹ See, 'Locke's Rule of Law', above.

¹²² LOCKE, *supra* note 4 at II, §137. For full quote, see note 4 above, and accompanying text.

appreciate the subtleties of Locke's account; nor do I suggest it is necessary to drill down into the contextual background of an author's meaning in every situation. I do, however, suggest that doing so—or at least actively appreciating that there is something more than mere anti-arbitrariness to Locke—is both uncomplicated and important. Yet, this is not generally done; and, it is not generally done despite the benefits that accrue to our understanding of the concept of the Rule of Law by doing so. By considering Locke's Rule of Law *only* in terms of arbitrariness, we are missing something fundamentally important. We are missing something because the very idea of arbitrariness hides a more complex web of problems; including his Rule of Law-like ideas.

The Problems with Locke

In considering 'Locke's Rule of Law', Locke is taken to be tackling the problem of arbitrary power. However, it is clear Locke had in mind far more than just this single problem. Locke's Rule of Law (as his account in context) responds to more than mere arbitrariness. Of course, the immediate question here should be: so, what? It would be correct to, first, question whether the difference in originating problems actually makes any difference and, second, question whether this difference merely has to do with the fact that I have applied a wider Rule of Law definition (and, hence, I am actually considering

something both *different* to 'Locke's Rule of Law' and, also, that what I am considering is not properly conceived of as the Rule of Law). I address this second question first.

Am I considering something different to 'Locke's Rule of Law'?

In circumstances where I have sought to adopt a slightly broader idea of the Rule of Law than that which is generally taken to be 'Locke's Rule of Law', I am, of course, considering *something* different. There must be differences in the accounts; this is, after all, the point that I am making. The more precise and helpful formulation of this idea is to question whether the difference is so substantial as to render my broad definition *not* actually an idea that could be a Rule of Law idea.¹²³ Given the way that I have generated the broader definitions that I adopt—and the fact that it is *more* abstract and *less* specific than the idea in 'Locke's Rule of Law'—there seems to be little complaint that can genuinely be raised to suggest that ideas of the Rule of Law, whatever they may be taken to be, would not fall within the definition that I adopt. On this basis, any suggestion that the definition adopted herein is *not* a Rule of Law idea seems unlikely to be capable of gaining any traction.

¹²³ I am happy to concede that Locke's position—whatever that may be taken to be—does indeed relate to the Rule of Law—whatever *that* may be taken to be.

Of course, one possibility for the differences may be as a result of 'Locke's Rule of Law' being put to *different* uses; the difference may be something that is actually to do with the way that the user / interpreter of Locke seeks to use the contemporary idea. In this respect, I return to the view that the adoption of a presently accepted / or acceptable view of what the Rule of Law *is* runs the risk of missing something about the concept (as it was meant to be understood by its author) that is important.¹²⁴ It is for this reason that the following question attains even more importance.

Does the difference make any difference?

More is not always better. Whilst it is clear that my exploration reveals there are several *more* Rule of Law-like problems that Locke may have been attempting to address in the *Two Treatises* than are appreciated in 'Locke's Rule of Law', the mere fact that considering additional factors in Locke's account—specifically the context of the writing of his content—does not necessarily provide a more accurate, or useful, conception of the Rule of Law. However, in this situation, more is both different *and* better; and these things conspire to mean that the difference does make a difference.

¹²⁴ See Chapter 1.

Locke's Rule of Law is more than a single problem concept. When viewed in context, it is a rich tapestry of ideas that stem from a fear of arbitrary rule *together with* three other problems that are inextricably intertwined with one another whilst, in turn, being bound together by a fundamental and motivating fear of popery. It is crucial to appreciate that arbitrariness is not a central concern and, further, may be facilitative of *other* problems (that may not relate to limiting power per se). Locke's account of arbitrary or absolute rulers seems to be, in many senses, another way for him to identify the likely or feared method of rule—as well as the outcome that may follow—that would be adopted by a catholic ruler. In this sense, Locke's mere use of the term 'arbitrary' is loaded; for this reason, it may not communicate the same meaning of the concept when it is applied in contemporary discourse. This is not to say that Locke did not seek to merely use—in some senses—something like the dictionary meaning (at least as it would currently be defined). But, in considering the problem / solution approach adopted herein, what is clear is that the solution must be understood in the context of the problem. In other words: there exists a genuine disagreement *only* if there are inconsistent views about the same subject matter; or, illustrating the other side of the relationship, there exists a genuine agreement *only* if there are consistent

views about the same subject matter.¹²⁵ Putting this another way, notwithstanding Locke's invocation of some very Rule of Law-like words—that include, *inter alia*, 'established and promulgated laws', 'declared and received laws', 'stated rules', and 'settled standing laws'¹²⁶—he can only be conceived as meaning the same thing as other theorists who use similar conceptual descriptions if those ideas—as solutions—relate to the *same* problems. Whilst that is the case with 'Locke's Rule of Law', this is not what occurs when Locke's Rule of Law is considered.

There is another way to view this disjoint. As noted in Chapter 2, the benefit of the problem / solution approach is that it provides two perspectives from which to consider an issue: from the problem's, *and* the solution's perspective.¹²⁷ This perspective shift can also apply when considering two forms of account in order to consider whether the problems to which the contemporary Rule of Law-like ideas—including those of 'Locke's Rule of Law'—are the same as those when Locke was writing. There is, of course, some crossover in the Rule of Law-like problems. As has been stated, arbitrary power remains the mainstay of Rule of Law discourse. Yet, whilst

¹²⁵ See Chapter 2.

¹²⁶ LOCKE, *supra* note 4 at II, §137.

¹²⁷ I expand upon this idea in Chapter 6.

issues associated with protection of property (widely conceived) could be seen to fall within some substantive ideas of the Rule of Law, the other problems—to do with a fear of popery, the authority of parliament, and a state of war—are far less obviously considered as (contemporary) Rule of Law-like problems. (Perhaps this illustrates why Locke is only conceived of in terms of arbitrariness—as this is the *only* useful aspect that can be cherry-picked given the contemporary problems in society?) As has been illustrated, there is a substantial difference between the single problem of arbitrariness that is frequently attributed to Locke, and the several problems that his account seeks to tackle. Accordingly, not only does the difference make a difference, it is clear that 'Locke's Rule of Law' is not Locke's Rule of Law.

'Locke's Rule of Law' is not Locke's Rule of Law: What Does this Mean?

There is, of course, one issue with stating "Locke's Rule of Law' is not Locke's Rule of Law': 'Locke's Rule of Law' never was *Locke's* Rule of Law. The account that I have identified as being different to the contextual account—the account in which Locke merely provides a solution to the exercise of arbitrary power—is not *actually* what Locke meant. The account is, however, what many Rule of Law thinkers simply take Locke to have said. This means that the way that Locke and 'Locke's Rule of Law' have been applied *may* provide an account that is different, in fundamental and crucial respects, to that which

Locke actually provided.¹²⁸ In considering the Rule of Law as a solution concept, and in considering the problems to which Locke was responding in providing his Rule of Law-like account, it seems clear that it is necessary—if we want to be clear about exactly what Locke’s Rule of Law-like idea was—that we fully comprehend the totality of the problems to which Locke was responding. This requires us to consider more than the simple form of arbitrary rule to which Locke is taken to relate. When we do this, it becomes obvious that our conception of Locke—at least insofar as the Rule of Law goes—may not be as secure as we have previously thought. It seems that Locke’s not a Lock(e) after all.

¹²⁸ I emphasise ‘*may*’ here, as I do not claim that the ultimate outcome of the difference between the two accounts must be different across the board.

CHAPTER 6:
HOBBS AND LOCKE:
BOTH SIDES OF THE STORY /
WHAT DIFFERENCE DOES IT MAKE?¹

INTRODUCTION:
EVERYBODY WANTS TO RULE THE WORLD / FIGHT THE POWER²

As will by now be clear, conceptions of the Rule of Law are legion, contested, not infrequently confused, and are often simply drawn together in a way that suggests—sometimes only implicitly—the thinkers responsible for the conceptions are all talking about the same idea. (Notwithstanding the contest that exists regarding the conceptual content.) I am sceptical about this; I do not accept many of the people associated with the Rule of Law are actually—let alone necessarily—talking about the same thing. By this, I do not

¹ PHIL COLLINS, *Both Sides BOTH SIDES OF THE STORY* (1993); THE SMITHS, *The Smiths WHAT DIFFERENCE DOES IT MAKE?* (1984). (I illustrate opposing sentiments with song titles that come from the same musical era. These not only provide nostalgic levity, but also a difference in viewpoint within a single media which illustrates the dangers of conceiving of works from a similar period—like Hobbes and Locke—as necessarily talking about the same idea.)

² TEARS FOR FEARS, *EVERYBODY WANTS TO RULE THE WORLD* (1985); PUBLIC ENEMY, *Fear of a Black Planet FIGHT THE POWER* (1989).

mean to suggest that the usual suspects of the Rule of Law³ *cannot* be lumped into a massively broad and over-general concept that is subsequently attributed the name 'the Rule of Law'; after all, that is exactly what currently happens. What I do mean to suggest is that there are problems with assuming that two terms, phrases, or ideas, that may be superficially similar, in two separate accounts, are necessarily comparable or reflect the same idea. To pick on one well known Rule of Law desideratum as an example, predictability is frequently cited as being an essential element of the Rule of Law; its essentiality can be identified or distilled from any number of Rule of Law accounts.⁴ However, I do not think that simple reliance on the common statement of an idea, or the mere similarity of term, in a Rule of Law account is sufficient; more is needed before any robust conclusion can be drawn regarding the existence of common themes. What I do in this chapter, in relation to Hobbes's and Locke's Rule of Law accounts from the last two chapters, is explore the similarities and differences to illuminate and explain the extension of a methodology that will allow the clarification of both their conceptions of the Rule of Law, as well as assisting in the process of bringing clarity to the content of the concept of the Rule of Law more generally. In

³ See Chapter 1 and Chapter 2.

⁴ For an expansion of the examination of the common idea of predictability, and others, see Chapter 3.

doing so, I make substantial progress toward answering the research question that I pose in this thesis: what is the nature of the change across Rule of Law conceptions?

By considering similarities and differences that can be seen at varying levels of analytical scrutiny in both Hobbes's and Locke's Rule of Law-like accounts in *Leviathan* and the *Two Treatises*, I argue that their accounts, whilst both coming within my broad Rule of Law definition, have almost no similarity. This absence of similarity is not simply based on the mere fact that the two accounts are, clearly, very different accounts; dissimilarity results from a deeper, conceptual, difference that has not previously been appreciated. As I have already considered their accounts as being solutions to problems in their societies, I first identify similarities on the face of the accounts (what I will call '*superficial*' similarities) before, second, illustrating why those similarities cannot be seen as true similarities: the solutions—even if couched in similar terms—respond to different problems and this renders them distinguishable from one another; these differences—notwithstanding a similarity of term or nomenclature—represent different Rule of Law *inflections*. What is also clear is that these differences do not reflect the differences that exist in relation to the caricatures often associated with both thinkers' work. By considering the accounts in terms of a problem / solution relationship, I identify any

similarities and differences that could, otherwise, be confused. In addressing the research question undergirding this thesis, this form of analysis can, as a result, be used as a foundation for the examination of conceptual change across other ideas of the Rule of Law.

The structure of the chapter is relatively simple. I first, briefly, restate the background to the Rule of Law debate, outline Hobbes's and Locke's Rule of Law caricatures, and illustrate some of the complications that exist when considering both of these thinkers. In *Disambiguating Hobbes and Locke*, I illustrate the way in which my problem / solution methodology can be extended to identify the issue with considering the superficial similarities in Hobbes's and Locke's Rule of Law-like accounts. Then, by considering the problems to which the two authors respond in their Rule of Law-like accounts, I consider whether the *apparent* similarities on the face of the accounts are *actually* similar before spending some time teasing out the nature of the differences between the accounts themselves. In the penultimate part—*Conceptual Comparisons as Conceptual Change*—I take steps toward answering my research question by considering how this sort of examination can assist in identifying mechanisms of change between different Rule of Law conceptions. In the final part, I offer some brief conclusions.

SIMILAR (?) RULE OF LAW ACCOUNTS:

TWO TRIBES GO TO WAR / BROTHERS IN ARMS⁵

Conceptions of the Rule of Law can appear to be either similar or different; but this depends on the level at which any analysis takes place. Of course, it cannot be denied that there are real differences between various conceptions of the Rule of Law. Differences can be seen in terms of the conceptual form in which conceptions are put forward; this includes, for example, differences in the desiderata that make them up, or the focus of the conception (i.e. whether it is formal or substantive).⁶ These are well explored and generally obvious points of difference. Less obvious, but no less important, differences exist in the context of some of the canonical conceptions that require modification of our appreciation of the ideas and their relative similarity / difference. For example, if Aristotle's conception of the Rule of Law is to have any cogency in relation to the contemporary idea of the Rule of Law, it simply makes no sense to consider it *only* in terms of a society in which slave ownership is both widely practiced and accepted as

⁵ FRANKIE GOES TO HOLLYWOOD, Welcome to the Pleasuredome TWO TRIBES (1984); DIRE STRAITS, Brothers in Arms BROTHERS IN ARMS (1985).

⁶ These differences—especially in terms of the usual suspects—have already been explored in the first three chapters of this thesis. These could be conceived as being first-order differences in the content of the Rule of Law conceptions.

morally acceptable. The aspects of Aristotle's thought that relate to slavery must be conveniently forgotten or read-down to facilitate some relevance for his ideas. This stark difference over millennia is no less apparent across a period of time that is an order of magnitude less; Dicey's late-nineteenth century English society was substantially different to any western democratic modern state that exists today. Substantive differences also occur on even smaller timescales: Hayek and Fuller's mid-twentieth century Rule of Law accounts, written either during or in the wake of the hostilities of the Second World War, belong to an era far removed from Raz's late-twentieth, or the U.N.'s early twenty first-century ideas of the concept.⁷

To avoid obvious discrepancies in analysis, it makes intuitive sense to consider accounts that come from within the same, or at least a closely related, society and period of history. Considering the Rule of Law-relevant

⁷ FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., 2007); Joseph Raz, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-226 (2 ed. 2009); UN SECURITY COUNCIL, *THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES - REPORT OF THE SECRETARY-GENERAL* 6 (2004), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (last visited Jul 20, 2018). For an account of the historical background to the concept, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW HISTORY, POLITICS, THEORY* (2004). For an account of why history is important in relation to the concept of the Rule of Law, see Chapter 1.

aspects of Hobbes's and Locke's ideas seems likely to minimise these contextual background-differences; after all, Hobbes's *Leviathan*, and Locke's *Two Treatises of Government* were authored only around 30 years apart.⁸ Both authors were—geographically and nationalistically speaking—Englishmen engaged in the enterprise of commenting on the nature of the exercise of power in England at the time. Yet, whilst, the temporal, geographical, and cultural relationship between these two have far more in common than between the other canons of the Rule of Law, works from similar contexts can be fundamentally different in focus;⁹ the precise nature of the endeavours in which each author was engaged, and the precise social groups with which they were associated were fundamentally different.

In disambiguating ideas associated with the Rule of Law, I will continue to use the two broad definitions that I have used thus far: the *normative force conception* and the *Rule of Law elements*.¹⁰ I consider any idea that satisfies

⁸ For the justification for dating *Leviathan* and the *Two Treatises* to January 1646–January 1651, and January 1679–April 1683, respectively, see Chapter 4 and Chapter 5.

⁹ This point is illustrated by the sub-titles adopted throughout this chapter.

¹⁰ For the theory and application of these ideas, see Chapter 3 (theory) and Chapter 4 and Chapter 5 (application).

either idea, as a *Rule of Law-like* idea. In this sense, Hobbes and Locke are both Rule of Law thinkers.¹¹

If a simple caricature of each thinker's account is adopted, Hobbes's and Locke's Rule of Law-like accounts (*'the accounts'*) can be seen as not only fundamentally different, but also largely opposing one another. In building off the consideration of the thinkers' caricatures in earlier chapters,¹² the caricatures could be put into these terms:

The ' <i>Lockean caricature</i> ':	A government opposing the operation of arbitrary or absolute power; ¹³ and
The ' <i>Hobbesian caricature</i> ':	A sovereign that can exercise largely arbitrary and unlimited power. ¹⁴

These are, in many senses, very abstract. When only the caricatures are considered, there is a clear difference between the two accounts. The caricatures do what caricatures do; they accentuate various features in order to create a memorable and recognisable representation of the thing. They do

¹¹ See Chapter 4 and Chapter 5.

¹² See Chapter 4 and Chapter 5.

¹³ This caricature, and its relation to Locke's Rule of Law, is considered in Chapter 5.

¹⁴ This caricature, and its relation to Hobbes's Rule of Law, is considered in Chapter 4.

not, however, capture *all* aspects of the conceptions.¹⁵ This is a problem for conceptual clarity.

An assessment of the accounts at a different level of analysis reveals a very different picture. Notwithstanding the fact that the position communicated in the caricatures is not incorrect *per se*, different levels of analysis expose not only different points of disagreement, but also in some respects points of agreement. Whilst I will expand upon this idea in the next part, the accounts fundamentally agree on the importance of consent; in both, consent facilitates the creation of the power structure—as the parliamentary government for Locke, or the Leviathan for Hobbes—which then facilitates Rule of Law-like controls. Where the relative level of agreement / disagreement can vary depending on the level at which conceptual analysis takes place, and notwithstanding the broad contextual similarity, what is required is a way to ensure that the appreciation of the accounts—as Rule of Law accounts—can be disambiguated in a way that does not throw the baby out with the bathwater.

¹⁵ As caricatures, nor are they meant to.

DISAMBIGUATING HOBBS AND LOCKE:

I STILL HAVEN'T FOUND WHAT I'M LOOKING FOR / ONE STEP BEYOND¹⁶

Whilst a contextual assessment of the accounts has revealed an unexpected level of similarity, the problem / solution methodology that has already been applied to the accounts provides a way to disambiguate between them and illustrate that although the accounts may be in some respects the same, they are in other respects different and differentiable. Considering both the problems that Hobbes and Locke were able to perceive in their societies at the time they were writing *together with* the solutions that they proposed provides one way to drill-down into the similarities and differences that exist between the accounts.

The problem / solution methodology suggests we can properly understand a (Rule of Law) solution only if we understand the correlative (Rule of Law) problem.¹⁷ In extending this idea, we can also say: we cannot assume there is a contest between theorists simply because two answers are different (as they could still mean the same thing); and, we cannot assume there is

¹⁶ U2, Joshua Tree I STILL HAVEN'T FOUND WHAT I'M LOOKING FOR (1987); MADNESS, One Step Beyond ONE STEP BEYOND (1979).

¹⁷ For the introduction of the idea generally, see Chapter 2: *How can we Assess What the Rule of Law is / was for a Particular Canonical Author?*

agreement between theorists because two answers are the same (as they could still mean something different). In Chapter 2, I suggested that the problem / solution approach facilitates refinement of any methodology based solely on consideration of the Rule of Law (as a solution *sans* problem) and provides increased precision in identifying the nature and meaning of any conception. I then, in Chapters 4 and 5, illustrated the application of this idea. There is, however, scope to expand the methodology in service of the questions raised in this chapter. Again, as noted in Chapter 2, a problem / solution pairing has the advantage of providing *two* perspectives from which to consider the nature of change: the solution's and the problem's. It is *this* aspect of the methodology that facilitates an additional point of contrast between Rule of Law solutions. This allows aspects of Rule of Law-like ideas, ostensibly postulated in the *same* terms, to be disambiguated as a result of the fact that they respond to *different* problems: different Rule of Law inflections can be differentiated. This sort of contrast is not possible if the Rule of Law-like idea alone (as the solution-half of the problem / solution equation) is considered simply on its own tenets.

Why Disambiguating is Important

When the superficially similar solutions provided by Hobbes and Locke in the accounts are considered in terms of the motivating problems,

differences emerge. The differences range from subtle, to stark; but, nonetheless, differences exist. It is useful before going any further to state why this difference is important. In doing so, I delve back into the problem / solution methodology.¹⁸

In circumstances where two accounts can be seen as superficially similar, the identification of a *different* problem that relates to the (superficially similar) solutions provides one way to disambiguate a precise meaning of each solution. If two questions are asked, and two answers are provided in ostensibly the same terms, the question itself can be used to provide context and meaning—and, hence, provide disambiguation—for the answer. A simple example will suffice. Consider these two questions: first, ‘what time will we eat lunch?’; and, second, ‘how many people have walked on the moon?’ The answer to both may be ‘12’; yet, it is clear the (superficially similar) answer means something very different in each case. The inflection imported to ‘12’ in response to each question is different. The same principle applies to the solutions provided by Hobbes and Locke: additional meaning can be gleaned by considering the problems to which the solutions were provided as a response. In this sense, and by way of an example, we may

¹⁸ See Chapter 2, Chapter 4, and Chapter 5.

consider the superficially similar solution regarding the operation and importance of consent as taking two forms:

The operation and importance of consent^H; and

The operation and importance of consent^L.

The former relates to Hobbes's formulation of the solution; and, the latter relates to Locke's formulation. In these senses, and through this formal construction, the two solutions—whilst related and superficially similar—are, *different* inflections of the same idea. This simple way to disambiguate is important because, when viewed in this way, it is clear that the accounts—although superficially similar—should not be conflated merely because there are certain terms, turns of phrase, or even more widely stated ideas that are held in common. This process of disambiguation allows each inflection to be conceptually separated and to be considered individually. Identifying these inflections enables us to be more conceptually precise in our understanding and application of each, either, or both of the ideas contained within the accounts.

To illustrate how it is possible to disambiguate the ideas contained within the accounts, it is necessary to first illustrate which aspects of the accounts are in need of disambiguation. As noted above in relation to the

caricatures, it is clear that the accounts are in many respects, largely different; they are also written from different perspectives, with different normative goals, and in relation to different societal crises.¹⁹

Similarities in Hobbes's and Locke's Solutions

The several similarities between the Hobbesian and Lockean solutions stand in stark contrast to the differences between the caricatures. The act of examining the accounts in greater detail shifts the accounts' relative coherence; the neat image provided by the Rule of Law-like aspects of the accounts in caricature is not, however, as simple as it first appears. Even if Hobbes and Locke view the world in very different ways, given the existence of *some* agreements, and in order to disambiguate, it is necessary to identify exactly where agreement may lie.

¹⁹ Hobbes provides a theory that was, at least at the time of writing, intended to provide a response to the Engagement Crisis, as a general guide for the exiled king; Locke was writing as part of the revolutionary Whig movement, intent on opposing Charles II's extension of powers and the ascension to the throne of the catholic brother and heir James (during the Exclusion Crisis), as part of the Earl of Shaftesbury's inner circle. It is, therefore, no exaggeration to say that Hobbes was arguing *for* Charles II, and Locke was arguing *against* Charles II.

The first, and most fundamental, aspect on which the accounts agree is the operation and the importance of consent. In Hobbes's and Locke's ideas of the social contract, an individual's consent to be subject to power is essential. Hobbes's social contract requires that the people provide consent—by compacting with one another—to be subject to a single, absolute, sovereign power.²⁰ Locke's view is that parliament's authority is grounded in consent: the government cannot oblige any action where consent is absent;²¹ political society will be joined, and government created, for the purpose of the common good.²² An undergirding aim in giving consent, for Locke, is that people enter civil society to extract themselves from the state of nature in order to protect their property.²³ For Hobbes, the aim is to avoid war and to seek peace.²⁴ In both accounts, society's end reflects a need or an intent to avoid being in the state of nature, and, as this requires individuals be

²⁰ See RICHARD TUCK, *HOBBS: LEVIATHAN: REVISED STUDENT EDITION* [85]–[88] (2 (Rev.) ed. 1996).

²¹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* II, §138, 142 (Peter Laslett ed., Student ed. 1988).

²² *Id.* at II, §131, 138.

²³ *Id.* at II, §85, 90, 124, 138, 229. In relation to unprotected property placing individuals in a state of war, see *Id.* at II, §222. Locke's state of nature can be seen as being more non-hypothetical (than Hobbes's).

²⁴ TUCK, *supra* note 20 at [85].

protected from one another, individuals consent to being subject to a power that can provide this protection.

The second point of agreement, relates to the transfer of individual's rights or powers to a centralized form of power that can wield it in pursuit of the society's ends. (This is, obviously enough, intimately related to the idea of consent.) For Hobbes, individuals compact to obtain protection from one another and they agree to be subject to the sovereign on the basis that protection is provided.²⁵ Hobbesian individuals cede their right to everything in order to obtain the benefit of protection.²⁶ Lockean individuals give up both their powers to do whatever is required to preserve themselves, as well as the power to punish.²⁷

The third area of agreement relates to the nature of sovereign authority and the need to obey commands. This, like the transfer of rights, also relates to consent. For Hobbes, the duty to obey does not stem from the power of the sovereign per se: it comes from the act of consent.²⁸ He puts it this way: '*I Authorise and give up my Right of Governing my selfe, to this Man, or to this*

²⁵ *Id.* at [85].

²⁶ *Id.* at [64]-[65].

²⁷ LOCKE, *supra* note 21 at II, §128-130.

²⁸ TUCK, *supra* note 20 at [87]-[88].

*Assembly of men, on this condition, that thou give up, thy Right to him, and Authorise all his Actions in like manner.*²⁹ Where the 'end of Obedience is Protection...', and Hobbes outlines the 'mutuall Relation between Protection and Obedience',³⁰ it follows for him that—where individuals need to seek peace and an escape from the state of nature³¹—a sovereign's commands should be obeyed. Locke provides a simple idea: the people's consent, given when joining or being part of civil society, provides the necessary authority and, crucially, the necessary constraint, on the exercise of power.³²

These three similarities become apparent when a contextual analysis of the Rule of Law-like aspects of the accounts is undertaken.³³ The suggestion that there are similarities may not, however, be intuitively analytically appealing. After all, it is apparent that Hobbes and Locke are, on both the scale of the most detailed textual analysis *as well as* in the most cursory

²⁹ *Id.* at [87] (italics in original).

³⁰ *Id.* at [395]-[396]. (This is the closing sentiment of the book.)

³¹ *Id.* at [64].

³² For the suggestion that one is obliged to follow the sovereign's commands once consent has been given, see LOCKE, *supra* note 21 at II, §121. Whilst it is clear that the duty to obedience subsists during the time that a sovereign acts in accordance with the trust placed in it, the duty to obedience ceases once illegal attempts are made on an individual's liberties. *Id.* at II, §134, 228.

³³ For a full contextual analysis of the Rule of Law-like accounts, see Chapter 4 and Chapter 5.

caricature, engaged in very different arguments with different goals. Given this conceptual sandwich created by clear disagreement at both extremes, with a level of agreement created by contextual analysis in the middle, the question could be raised as to what benefit my identifying similarities holds. Two answers are offered. The first is simply that *any* further analysis is helpful in clarifying the exact meaning and nature of a conception; and this is never more apparent than in the case of conceptions of a concept like the Rule of Law that is so hotly contested. The second response is more substantive and is illustrative of a wider point I want to make in this thesis: consideration of Rule of Law-like aspects of the accounts results in the potential to disambiguate what may otherwise—at a certain conceptual level, or, on the face of it—appear to be similarities. By conducting a problem / solution contextual analysis of the accounts it is possible to facilitate this disambiguation. It is then possible to further interrogate the aspects of agreement outlined above.

Are the 'Similarities in Hobbes's and Locke's Solutions' Similar?

The accounts' solutions do not exist in a vacuum; they respond to a number of problems that can be identified through an analysis of the context in which Hobbes and Locke were writing. The unprecedented periods of turmoil in which Hobbes and Locke existed led to an unprecedented number

of pamphlets that commented on, critiqued, or supported the various issues or arguments that, collectively, reflected society's most important problems of the time. In using pamphlets to reflect problems that were perceivable by Hobbes and Locke I go beyond simply considering the Rule of Law-like solutions (*sans* problems) they provide. By exploring the differences in the problems that give rise to the accounts, the solutions' (dis)similarities can be exposed. I explore the relationship between the various problems and solutions that can be seen in the accounts. In doing so, I relate the accounts' similarities back to each author's problem categorisation in Chapters 4 and 5.

The Operation and Importance of Consent

Consent represents, at the most fundamental level, the clearest and most obvious similarity between the accounts. It makes sense, therefore, to start here. Hobbes's and Locke's social contract arguments were each focused on exposing the essential role of consent in relation to the legality or authority of the government. However, notwithstanding this similarity, the problems that motivated their solutions were fundamentally different: Hobbes was motivated by questions regarding an existing sovereign's legitimacy; Locke was motivated by questions regarding how a ruler or soon-to-be ruler is acting or may act.

Hobbes's consent-solution addresses several problems perceivable by him. One of the most fundamental problems that emerged can be summarised by a single question: is consent necessary to be ruled (and has it been given)?³⁴ Arguments that consent was a necessary aspect of being ruled were provided by well-known groups, authors, and pamphleteers.³⁵ Tyranny, it was said, follows the absence of consent.³⁶ Whilst these forms may be seen as representative of a parliamentary cause—especially where popular royalist arguments often took the form of a divine right of kings in which consent was not present³⁷—Hobbes's argument sought to adopt what could be seen as the 'opposition's' tactic regarding consent, and use it to justify the execution and application of absolute power. In doing so, his solution brought together two

³⁴ See Chapter 4: *The necessity of (the people's) consent and its effect on the legality/legitimacy of the government.*

³⁵ For example, RICHARD OVERTON, *AN APPEALE FROM THE DEGENERATE REPRESENTATIVE BODY* (1647); JOHN MILTON, *THE TENURE OF KINGS AND MAGISTRATES* (1649); JOHN LILBURNE, *ENGLANDS NEW CHAINS DISCOVERED* (1649).

³⁶ Whilst this was frequently stated, see, as one example, LILBURNE, *supra* note 35.

³⁷ The most famous work of this kind is Robert Filmer, *Patriarcha*, in *PATRIARCHA AND OTHER WRITINGS* 1–63 (J. P. Sommerville ed., 1991). Whilst this was not published until 1680, similar works by Filmer in substantially similar terms were available during the time Hobbes was writing. See, Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy*, in *PATRIARCHA AND OTHER WRITINGS* 131–171 (J. P. Sommerville ed., 1991); Robert Filmer, *The Necessity of the Absolute Power of all Kings*, in *PATRIARCHA AND OTHER WRITINGS* 172–183 (1991).

disparate groups' popular arguments. As a royalist, Hobbes faced, in effect, a problem that required a solution that could vindicate the imposition of absolute power in a way that ensured the parliamentarians were not able to trump the King's power. Hobbes's consent-solution also responded to problems associated with claims that there was a requirement to obey a sovereign in power merely as a result of that sovereign being in power. This argument, relating to *de facto* powers, was a key focus of the Engagement Controversy pamphlets. In more specific terms, this related to whether the parliamentarians' possession of government power (as civil war victors) was sufficient to warrant obedience from the population.³⁸ Hobbes's consent-solution, in effect, takes off the table the questions associated with *de facto* power as—at least under a Hobbesian consent-based scheme—the only way a sovereign can come to power is through consent. Finally, Hobbes's consent-solution also responded to questions regarding the purpose or ends of government.³⁹ This related to the mutual obligation between protection and obedience, and the idea that self-preservation is a basic motivation for obedience, that was also raised in the pamphlet literature.⁴⁰ In short, the

³⁸ See Chapter 4: *The impact and relevance of possession (of governmental power)*.

³⁹ See Chapter 4: *The purpose or ends of government*.

⁴⁰ See Chapter 4: *The duty, or obligation, of obedience from protection*. Regarding self-preservation as motivation, see ROBERT SANDERSON, *A RESOLUTION OF CONSCIENCE* (1649). For an example the 'mutual obligation' idea, see ANON., *CONSCIENCE PUZZEL'D*

Hobbesian multi-faceted solution was that consent to be ruled was given to escape the state of nature and, further, the imposition of absolute power was necessary to avoid a state of war—the natural inclination that we should seek peace ensured that consent must continually be given.

In contrast, the Lockean form of consent was a solution to empower the parliamentary cause. However, this statement retains the superficial distinction related to the outcome of the *solution*. What is needed is a consideration of the Lockean problems for which consent is offered as a solution. Most obviously in terms of the *First Treatise*, there is an element of Locke's argument that responds to the idea of divine right as put forward by Filmer in *Patriarcha*.⁴¹ This was most frequently raised in opposition to the Whig argument that consent through parliament was opposed to various other fears like arbitrary government, a standing army, or rule by catholic monarchs.⁴² Whig efforts were focused, in no small part, on addressing the

(1649). For further discussion, see QUENTIN SKINNER, 3 VISIONS OF POLITICS: HOBBS AND CIVIL SCIENCE 300 (2002); JOHN M. WALLACE, THE ENGAGEMENT CONTROVERSY 1649-1652: AN ANNOTATED LIST OF PAMPHLETS (1964).

⁴¹ Filmer, *supra* note 37. Not only was *Patriarcha* published during the time that Locke was writing the *two Treatises*, but Filmer also republished the *Free-holders Grand Inquest* in the same year. ROBERT FILMER SIR, THE FREE-HOLDERS GRAND INQUEST (1680).

⁴² See Chapter 5: *The Authority of Parliament*. For an example of this form of argument, see CHARLES BLOUNT, AN APPEAL FROM THE COUNTRY TO THE CITY 4-5 (1679).

problem that flowed from suggestions of a divine right of kings, with their own solutions regarding the authority of parliament via the consent of the people. Locke's consent-solution (relatedly) also stretched to his account of the protection of individuals' property. Putting this point more particularly, the problem expressed in the pamphlet literature was that a popish sovereign would lay claim to individuals' property⁴³ and the Whigs, unsurprisingly, held parliament out as an effective security against the loss of individual's lives, liberties, and estates.⁴⁴ Parliamentary government, again with an eye on unlimited and arbitrary power, is offered as a check on the exercise of power. In these senses, parliamentary authority is seen as a defence problem: one concerned with the way in which parliament can operate so as to counter the operation of arbitrary power, the impact of a popish influence, and the repossession of property.⁴⁵ The issue of exactly *how* consent as a defence would operate constituted the nature of Locke's solution to these various Rule of Law-like problems.

In the accounts, in relation to the 'similar' solution of consent, we can see two distinct forms of problems. Hobbes is responding to a set of consent-

⁴³ See Chapter 5: *Repossession of Property*.

⁴⁴ See, for example, WILLIAM JONES, *A JUST AND MODEST VINDICATION* 16–17 (1682).

⁴⁵ See Chapter 5: *Repossession of Property*; *Popery / a Catholic Monarch*; and, *An Arbitrary Sovereign*.

problems—where an existing sovereign’s legitimacy was questioned, and where there existed an issue regarding the extent or form of power to be exercised—that question how the exercise of arbitrary or absolute power can be justified. Locke is responding to a set of consent-problems that question how—when a ruler or soon-to-be ruler is acting, or will act, arbitrarily and threatens property—consent can operate as a defence against the exercise of power. This is more than a mere statement of the polemical approaches that Hobbes’s and Locke’s accounts undoubtedly were intended to bring to their respective political camps’ propaganda campaigns. The problems run deeper than this. The problems—let us not forget—exist independently of the accounts as they are merely illustrated through the periods’ pamphlet literature. The problems reflect the fundamental pre-suppositions—as well as the preoccupations—of society itself. Hobbes was responding to a problem that questioned the way in which something had happened; whereas Locke’s problems reflect a more radical questioning of the fundamental norms upon which society is based.

The Transfer of Individuals’ Rights or Powers

In both accounts, the idea of a transfer of rights or powers is intimately connected to the problems associated with consent; it is, for both Hobbes and Locke, the act of consent that facilitates the transfer. However,

notwithstanding this similarity, the rationale behind the transfer is different: there is a difference between the nature, and the extent, of any transfer. In relation to the problems that motivated Hobbes's solution, these relate to the need for protection from *one another* and to the suggestion that this can be achieved by yielding to a common power.⁴⁶ Arguments were also made that men [sic] should seek peace to remove themselves from the state of nature,⁴⁷ or through the expression of the idea that absolute power is necessary to preserve a safe society.⁴⁸ In these senses, the root cause of the motivation for the giving of any consent related to the tyranny that could be inflicted between individuals in a state of nature. This idea forms the basis of Hobbes's transfer-solution.

Locke's problems, however, stem from a different root. The problem—at least as far as the Whigs were concerned—related to the justification of parliament's ability to govern as a representative institution (through the consent of the people).⁴⁹ The basic point was that parliament, unlike a popish

⁴⁶ MARCHAMONT NEDHAM, *CASE OF THE COMMON-WEALTH STATED* (1650). In relation to Hobbes's perceivable problems, see Chapter 4: *The needs of ultimate ends of society*.

⁴⁷ See, for example HENRY PARKER, *SCOTLANDS HOLY WAR* (1651).

⁴⁸ See, for example ANON., *supra* note 40.

⁴⁹ See Chapter 5: *The Authority of Parliament*.

sovereign, would not assume greater power, and that property owners would not lose their estates.⁵⁰ The arguments against this position related to the fact that parliament's powers were recently established, and questioned the inability of parliament to be truly representative.⁵¹ What was largely being suggested by the Whigs in their opposition to and agitation against the threat of arbitrary popish rule (with the associated threat to individuals' property), was the operation of a specific grant of powers and rights—through the limited nature of the consent granted—as a throttle on the exercise of arbitrary (and absolute) power. In short, the problem for the Whigs—as Locke was, no doubt, considering the problems from a Whig's perspective—was to demonstrate a way that a parliamentary sovereign *would* not exercise and, indeed, *could* not exercise absolute or arbitrary power in the way that it was suggested a popish prince may do. It was on this basis that Locke formulated his transfer-solution.

Hobbes and Locke formulated superficially similar responses: there should be a transfer of individuals' rights or powers in order to establish

⁵⁰ PHILOLAUS, A CHARACTER OF POPERY AND ARBITRARY GOVERNMENT (1681).

⁵¹ See, for example, MATTHEW RIDER, THE POWER OF PARLIAMENTS IN THE CASE OF SUCCESSION (1680); ANON., THE INTEREST OF THE THREE KINGDOMS (1680); JOHN NALSON, THE COMPLAINT OF LIBERTY & PROPERTY AGAINST ARBITRARY GOVERNMENT (1681).

sovereign authority. However, the problems informing these solutions are clearly distinguishable. Hobbes's context involves problems related to fears of tyranny on a horizontal scale (between individuals). As a result, his social contract transfer-solution was formulated in terms where individuals enter an agreement to give rights to an absolute ruler that can ensure the safety of individuals where a state of war between individuals was a primary fear and motivational factor for entering the social contract.⁵² Locke's problem relates, instead, to problems regarding individuals and the sovereign as it stands (or will stand); in other words, the problems relate to the exercise of power on a vertical scale. It for this reason that Locke's transfer-solution operates both as a limitation on the power that is to be subsequently exercised, and to illustrate why the grant cannot be in the form of absolute power.⁵³

In a (very) broad sense, Hobbes's transfer-solution stemmed from the need to justify why power *must* be exercised at an absolute level; for Locke, the solution relates to why it *cannot* be exercised at that level. This fundamental distinction comes from the nature of the problems to which they were responding and the context in which they were writing: Hobbes was

⁵² See Chapter 4: *Hobbes's Solution to the Pamphleteers' (Rule of Law) Problem: Solving Only One Problem?*

⁵³ See Chapter 5: *Locke's Solutions to Process Problems.*

attempting to illustrate the transfer of rights was valuable (for the sake of protection); Locke was attempting to illustrate the transfer of rights was not detrimental (as it imposed a natural limit on the exercise of power).

The Nature of Sovereign Authority and the Need to Obey Commands

Any aspect of commonality in relation to the nature of sovereign authority and the need to obey sovereign commands between Hobbes's and Locke's account must be located at the most general level of any of the common solutions identified here. Anyone with a passing familiarity with Hobbes and Locke will appreciate a number of differences in these ideas that are clear and apparent on the face of any account. It is for this reason that I suggest the similarity of solution exists only in the most abstract of senses when their solutions are generalised into solution-types; i.e. that both accounts provide solutions that relate to these factors. Whilst I do not anticipate that this (possibly overly) general account will be persuasive when taken alone, I hope its inclusion will bolster my wider argument.

A key problem that arose in the period in which Hobbes was writing *Leviathan* was the question of *de facto* power: whether obedience to the new-parliamentary-regime was lawful, even if the change in government and

the ousting of Charles I as head of state had been unlawful.⁵⁴ There were suggestions that, even if the government's legitimacy is doubted, it is not the place of the individual to meddle,⁵⁵ and suggestions that support of the government is justified if there is no power to visibly oppose the purported-sovereign.⁵⁶ The question boiled down to whether mere possession of the seat of power *requires* obedience. One of the most prominent pamphleteers, in a number of pamphlets published within months of one another, suggests those demanding obedience must have possession.⁵⁷ Similar sentiments, and ardent opposition views, followed.⁵⁸ These problems also led to the posing of

⁵⁴ For examples of similar views of the period, see SKINNER, *supra* note 40 at 271, 292; WALLACE, *supra* note 40; THE INTERREGNUM: THE QUEST FOR SETTLEMENT, 1646-60, 83 (G. E. Aylmer ed., Revised ed. 1974). For a more detailed exploration of these problems, see Chapter 4: *The necessity of (the people's) consent and its effect on the legality/legitimacy of the government; The impact and relevance of possession (of governmental power); and, The duty, or obligation, of obedience from protection.*

⁵⁵ For one of the most well-known defences, see JOHN DURY, A CASE OF CONSCIENCE RESOLVED (1649).

⁵⁶ FRANCIS ROUS, THE LAWFULNES OF OBEYING THE PRESENT GOVERNMENT (1649).

⁵⁷ ANTONY ASCHAM, A COMBATE BETWEEN TWO SECONDS (1649); ANTONY ASCHAM, OF THE CONFUSIONS AND REVOLUTIONS OF GOVERNMENTS (1649).

⁵⁸ For similar points, see ANON., A LOGICAL DEMONSTRATION OF THE LAWFULNESS OF SUBSCRIBING THE NEW ENGAGEMENT (1650); NEDHAM, *supra* note 46. For opposition points, see NATHANIEL WARD, A RELIGIOUS DEMURRER, CONCERNING SUBMISSION TO THE PRESENT POWER (1649); JOHN AUCHER, ARGUMENTS AND REASONS TO PROVE THE

a further but related question: does *protection* by the government obligate the citizen to obey the government?⁵⁹ These points lay the foundation for subsequent suggestions that self-preservation is a basic motivation for obedience.⁶⁰ Between questions considering whether mere possession or the provision of some sort of protection, or indeed any motivation behind the creation of an obligation of obedience, it is clear that the question being explored during the Hobbesian authoring period is one of why individuals must obey the extant sovereign.

The problem on which society was focused during the authoring period of the *Two Treatises*, in contrast, related to the issue of whether the extant sovereign (in the King) or a future sovereign (in parliament) should be

INCONVENIENCE & UNLAWFULNESS OF TAKING THE NEW ENGAGEMENT (1650); ANON., THE GRAND CASE OF CONSCIENCE STATED (1649).

⁵⁹ ANTONY ASCHAM, THE BOUNDS & BONDS OF PUBLIQUE OBEDIENCE (1649). This is a defence of Rous, and a reaction to Ward. WARD, *supra* note 58. See also ASCHAM, *supra* note 57.

⁶⁰ SANDERSON, *supra* note 40. This opposes Ascham, as the author separates the force and authority of the government. See, WALLACE, *supra* note 40; SKINNER, *supra* note 40 at 301. See also Ascham's response ANTONY ASCHAM, A REPLY TO A PAPER OF DR SANDERSONS (1650). Ascham's largely secular point is taken up by others in secular terms. See JOHN DURY, CONSIDERATIONS CONCERNING THE PRESENT ENGAGEMENT (1649). For a response to Dury, see HENRY ROBINSON, AN ANSWER TO MR. J. DURY (1650).

obeyed. There are close parallels between some of the issues. For example, the (Lockean period) question of how an 'Arbitrary absolute Popish Tyrant' can be a lawful successor to an established and bounded government in circumstances where he 'violently, unlawfully, and tyrannically overruns the due bounds of power' could, equally well, be applied to Hobbes's authoring period.⁶¹ However, whilst the difference to the problems explored in Hobbes's authoring period is not stark, it is important. I have already noted some of the questions that arose in relation to the authority of parliament.⁶² The key point relates to the questions regarding the ability of parliament to function as it claimed it would: as a representative institution. The pregnant question in this point is: if parliament cannot be what it suggests it must be to rule, then it should not be obeyed. The contrary position—again referred to above⁶³—is the Filmerian argument related to the divine authority of Kings: the monarch should be obeyed in consequence of natural law and the authority bestowed by God.⁶⁴ Whig responses were focused on illustrating reasons why

⁶¹ ELKANAH SETTLE, *THE CHARACTER OF A POPISH SUCCESSOUR* 20 (1681).

⁶² See above, notes 42 and 49, and associated text. Regarding the problems related to Locke's authoring period, see Chapter 5: *An Arbitrary Sovereign*; and, *The Authority of Parliament*.

⁶³ See above, notes 42 and 49, and associated text. See also Chapter 5: *An Arbitrary Sovereign*; and, *The Authority of Parliament*.

⁶⁴ Filmer, *supra* note 37; ROBERT FILMER SIR, *THE FREE-HOLDERS GRAND INQUEST* (1648).

the divine right of kings was sub-optimal and that, in comparison, parliament—as an institution created and limited by the consent of the people—represented a far superior option. This problem is, subtly, different to that which is being addressed in the earlier authoring period. Whilst alternatives were not un-mentioned in the period in which Hobbes was writing, the prominence of alternate institutions is not as apparent in the form of the problems raised. In contrast, the latter period's problems relate principally to the suggestion of, and lobbying for, an alternative in the course of arguing that at least one prominent and popular opposing account is deficient.

In the remainder of this chapter, I will expand upon the nature of the difference and explain why the difference is important to both the consideration of Hobbes and Locke, and in relation to the contest regarding conceptions of the Rule of Law more generally.

THE CHARACTER OF DIFFERENCES:

HERE I GO AGAIN / SHOULD I STAY OR SHOULD I GO?⁶⁵

There has been a change in Rule of Law-like ideas over time. This point is, in many respects, unsurprising and widely accepted.⁶⁶ As already illustrated, the nature of the difference in accounts is—beyond the most obvious differences—infrequently considered. However, it is also correct to say that there has been little consideration of the way in which supposed similarities in Rule of Law-like accounts—which are frequently both assumed and relied upon—are, in fact, *not* similar. Being clear about what we mean when we consider two accounts as either being the same or as communicating the same argument / point is not only an analytically desirable outcome, it is also a fundamentally necessary one if we are to understand, operate, and apply the broader idea of the Rule of Law. In taking a further step toward exposing the inherent problems with failing to appreciate or apply this point in relation to the Rule of Law, I illustrate there has been a change in the nature of the Rule of Law between the two

⁶⁵ WHITESNAKE, *Saints and Sinners* HERE I GO AGAIN (1982); THE CLASH, *Combat Rock* SHOULD I STAY OR SHOULD I GO (1982).

⁶⁶ This point is one of the widely accepted, and frequently stated, Common Assumptions of the Rule of Law. See, Chapter 2.

accounts; for this reason, the accounts' supposed similarities should not, therefore, be assumed, nor should they be relied upon.

Differences, Similarities, and How These Relate

In the preceding parts, I have identified that: Hobbes and Locke are, by way of their caricatures, frequently taken to be doing very different things; yet, notwithstanding the various differences, the accounts can, at least at some level, be seen as being similar (let us call this a '*first stage*' consideration); the similarities that are apparent in first stage considerations can, as I illustrated in the last part, be disambiguated through considering the solutions provided in the accounts in the context of their associated problems (let us call this a '*second stage*' consideration). The second stage reveals differences in the accounts; but, as I will illustrate, the differences that can be seen are not uniform. To see this, in the context of first stage similarities, it is useful to summarise the nature of the differences that arise at the second stage:

<i>First Stage Solution Similarity</i>	<i>Thinker</i>	<i>Second Stage Differences/ Motivating Problems</i>
The Operation and Importance of Consent	Hobbes:	Addressing an existing sovereign's legitimacy
	Locke:	Addressing how a ruler or soon-to-be ruler may act
The Transfer of Individuals' Rights or Powers	Hobbes:	Justifying why power must be absolute
	Locke:	Arguing why power cannot be absolute
The Nature of Sovereign Authority / the Need to Obey Commands	Hobbes:	Stating why an extant sovereign must be obeyed
	Locke:	Suggesting an alternate sovereign power as superior to the extant power

Table 1.1: The similarities and Differences at the Second Stage of Consideration

As will be apparent, the first stage similarities of solutions are in the column on the left, whilst the respective–different and differing–problems that relate to each thinker's formulation of the solution are on the right. I have already exposed how the accounts' solutions are different in relation to each of the first stage similarities. However, what is also apparent from the summary above is that the nature of these differences is, itself, different to the 'other' difference that is suggested by the Lockean and Hobbesian caricatures. To see what I mean by this, recall that the caricatures were put in these terms:

The '*Lockean caricature*': A government opposing the operation of arbitrary or absolute power; and

The '*Hobbesian caricature*': A sovereign that can exercise largely arbitrary and unlimited power.⁶⁷

In considering these, the difference between the two caricatures can be said to be (something like): a government or sovereign can exercise (Hobbes) or oppose (Locke) arbitrary power. Putting this another way, the willingness or ability of a government or sovereign to either exercise or oppose arbitrary power reflects the difference between the two. This sort of difference is a functional one: it relates to the function of opposing or exercising arbitrary power. (It is this intimate relationship to arbitrary power that makes these ideas fundamentally Rule of Law-like in terms of the broad distinctions adopted here.) As *both* caricatures can also be categorised as functional, consideration of the functional nature of the difference is relatively straightforward. However, this functional difference is not the same as the differences between the second stage problems; in other words, although there is a similarity in some sense—as there are differences between the two accounts—the differences that can be seen are *themselves* different in their nature.

⁶⁷ See above, notes 13 and 14.

The difference between the problems at the second stage of consideration varies in relation to both the difference between the problems, and in relation to the different nature of the problems (to each solution) themselves. For example, in considering the problems that relate to the operation and importance of consent, Locke's societal problems relate to a functional problem: how a ruler, or soon-to-be ruler, may act. But, but the problem that relates to Hobbes—addressing an existing sovereign's legitimacy—is not functional.⁶⁸ It is recognitional. It relates to the necessary state of mind or situation that must exist for a sovereign to be recognised as such.

The difference in differences is not, however, general. The problem contexts relating to the solution that there should be a transfer of individuals' rights or powers can both be conceived in functional terms; both accounts' problems relate to the nature of the exercise of power (as being in either absolute or non-absolute terms). However, the difference that is revealed is still, nevertheless, subtly different to the functional difference between the caricatures. Whereas there is undoubtedly a close relationship between the

⁶⁸ Here, I am not stating that legitimacy itself does not have a function. It clearly does. What I mean by this is that the question that concerns Hobbes is not one related to the function of the sovereign.

two forms of differences, those related to the second stage consideration are clearly broader; there isn't merely a relation between the function of a sovereign (of opposing or exercising arbitrary power as in the caricatures' differences); the second stage differences relate to both the exercise *and* the constitution of the powers that can be exercised. This breadth is not apparent from the mere functional difference between the caricatures. In this sense, even where the functional aspect is similar, a difference can *still* be identified.

In considering the difference between the problems relating to the solution regarding the nature of sovereign authority / the need to obey commands, there is also a marked difference at the second stage when compared to the caricatures' difference. The problem with which Hobbes is concerned relates to the normative reason or justification that *subjects of power* should obey commands; whilst, Locke's problem context relates to the relative comparison of various forms of sovereign power. Accordingly, not only can neither problem context be conceived of as being functional in nature, the two contexts themselves are different to one another.

It is clear that there are not only significant differences across the nature of the problem contexts to which Hobbes and Locke were responding, but also that these problem contexts are fundamentally different to the nature of the difference that can be seen from considering the caricatures of

Hobbes's and Locke's accounts. We are left with the conclusion that not only are there differences, but also that apparent similarities (in the existence of differences generally between the caricature and the second stage) are, in fact, also different. A question, however, remains: why are these differences important?

Benefits of Disambiguation

The identification of the difference between the caricatures and the second stage problems that contextualise Hobbes's and Locke's accounts provides a further way to disambiguate the differences, and similarities, in the accounts identified earlier in the chapter. Where the caricatures already provide one way of conceiving of the accounts as being different, the addition of *another* way to illustrate a difference could, more properly, be seen as a way to nuance that difference. This is, of itself, a useful feature as it illuminates one way in which the caricatures may fail to completely characterise the differences in the accounts. Furthermore, this nuanced approach also facilitates the identification of the differences in nature between the second stage problems as perceivable by Hobbes and Locke.

Considering the relative problems in this way, and in-keeping with my illustration that a single answer to two different questions can be

disambiguated by the question, the relatively similar answers given in the accounts stem not only from problems that relate to a different subject matter—something that is apparent from the content of the pamphlets—but also from problems that fundamentally differ in their nature. In this sense, the problems that are being responded to—again, much like my question example—are of a fundamentally and structurally different type. The answers that are given, notwithstanding any similarity of expression or content, must therefore be disambiguated in order to avoid assuming that the answer given by one thinker in one context reflects a similar—or even identical—answer given in another context.

The identification of these different differences enables two broad conclusions to be drawn. The first is that the Rule of Law-like conceptions that are provided by Hobbes and Locke should be seen as relating to very different ideas (by virtue of the very different problems to which they respond). Whilst this is, in some respects, hardly a revelatory conclusion, the fact that the differences to which I refer do not merely reflect—and are quite separate from consideration of—the textual differences is, I think, somewhat more revelatory and interesting from a Rule of Law perspective. The identification of this idea leads to a second conclusion in terms where Hobbes and Locke can both be considered as relating Rule of Law-like ideas:

changes in ideas of the Rule of Law—from one thinker to the next—can be more accurately and effectively identified where more nuanced differences between conceptions can be identified. Before concluding the chapter, I want to briefly consider this idea.

CONCEPTUAL COMPARISONS AS CONCEPTUAL CHANGE:

PARADISE CITY / IT'S THE END OF THE WORLD AS WE KNOW IT⁶⁹

Conceptual similarities and differences can be used as a way of identifying or considering the operation of certain forms of conceptual change. By illustrating a method of drilling down into Rule of Law-like ideas in order to identify and disambiguate similarities and differences that may appear at varying levels of examination, I have demonstrated it is possible to obtain a nuanced appreciation of a particular Rule of Law-like account's meaning and to better understand how to consider that account in terms of and in relation to another account. Where it is stated that the idea of the Rule of Law has often changed over time,⁷⁰ considering change—from Rule of Law-like idea to Rule of Law-like idea—through a more nuanced approach that can shed light on the form of that change is sensible. I briefly suggest a form this

⁶⁹ GUNS N' ROSES, *Appetite for Destruction* PARADISE CITY (1988); R.E.M., *Document* IT'S THE END OF THE WORLD AS WE KNOW IT (AND I FEEL FINE) (1987).

⁷⁰ See Chapter 2.

sort of analysis may take. (I do not consider the exact nature of the change between Hobbes and Locke, that will follow in Chapter 7.)

Forms of Change: Evolutionary and Revolutionary (a recap)

In Chapter 2, I outlined and explained two ways to conceive of change: evolutionary and revolutionary.⁷¹ Given that was some time ago, the briefest of summaries is apposite. I suggested two—binary and extreme hypothetical—mechanisms by which change across Rule of Law-like ideas *could* occur (in a *macro-* sense): *evolutionary change* and *revolutionary change*. Evolutionary change describes a change in the way that the Rule of Law is conceived that necessarily relates to, follows on from, or expands a prior conception; conceptual change occurs diachronically, and earlier conceptions are necessarily relevant to subsequent conceptions. Revolutionary change describes discreet, unrelated, iterations of the Rule of Law as paradigm shifting events; subsequent ideas are *not* necessarily reliant on earlier ideas; later ideas implicitly or explicitly supplant earlier ones. As evolutionary change *necessarily* relates to a previous idea, change is either evolutionary or it is not; if it is not evolutionary, it is revolutionary.

⁷¹ For a complete explanation of this idea, and more detail, see Chapter 2: *Change (Over Time and by Thinker) in Rule of Law Ideas*.

Form of Change: Considering Conceptions

How would the two hypothetical forms of change be considered in terms of Rule of Law-like conceptions? And, how does adopting a problem / solution approach assist? In responding to these questions, I adopt a Hobbes / Locke framework; this is not because I want to draw any final conclusions here, it is simply expedient given the details already provided. As defined, in order to identify evolutionary change, a necessary connection to a prior idea must be established. This means, if evolutionary change has occurred between the accounts, Locke's account must have a connection to a prior Rule of Law-like idea. Whilst Hobbes is not the sole provider of Rule of Law-like accounts *before* Locke, his account provides a logical starting point. In adopting this starting position, the aim would be, first, to identify exactly what Locke meant by his Rule of Law-like idea, before, second, attempting to find any necessary connection to Hobbes's prior ideas. The problem / solution framework, and the added clarity and nuance that it can bring to an individual account, assists in establishing the first aspect. The subsequent examination of differences and similarities that then becomes possible as a result of the framework's application enables the immediate discounting of various earlier ideas as being *unnecessary* to subsequent conceptions in circumstances where differences of problem, or differences in nature, can be identified. In

short, the aim is to identify a situation where the same form of problem gives rise in a later conception to a similar form of solution; it is only in this circumstance that a necessary connection can be formed between prior and later conceptions. In this way, the problem / solution framework can be used as an early filter to discard various aspects that are *unnecessary* to subsequent conceptions. This enables substantial steps to be taken to identifying the operative mechanism of change between the two conceptions examined.

CONCLUSION:

UNDER PRESSURE / DON'T WORRY BE HAPPY⁷²

The problem / solution approach can be used to illuminate conceptual change across the full gamut of Rule of Law-like conceptions. The approach can also be used to shed much needed light on the contemporary debate regarding the content and nature of the concept of the Rule of Law itself.

The many and varied accounts that are frequently associated with the concept of the Rule of Law are not only contested, but they also appear to be either similar or different depending on the level of analytical scrutiny that is

⁷² QUEEN (FT. DAVID BOWIE), Hot Space UNDER PRESSURE (1981); BOBBY MCFERRIN, Simple Pleasures DON'T WORRY, BE HAPPY (1988).

applied. In this sense, and within the ongoing debate regarding the content and meaning of the concept of the Rule of Law, Hobbes's and Locke's Rule of Law-like accounts can be seen to either agree or disagree; however, the similarities or differences can be disambiguated by adopting an approach that seeks to situate the accounts—as solutions—in the societal context—and the associated problems—in relation to which they were meant to be situated. By illustrating the existence of inflections, the problem / solution approach illustrates that superficially similar aspects of each account are, in fact, different (by virtue of the superficially similar solution being a response to a different problem), and facilitates the identification of differences between frequently stated Hobbesian and Lockean caricatures and the nature of the problems to which their accounts were meant to solve. This process of disambiguation, and the nuance that is added to each account, also illuminates change across conceptions of the Rule of Law by identifying when a necessary connection may—or may not—exist from one conception to the next.

A definitive conclusion is not reached here regarding the potential evolutionary or revolutionary nature of the change in the concept of the Rule of Law between Hobbes's and Locke's accounts. The reason for this is because there is another form of difference that may impact the nature of the

change from conception to conception. This form of difference—that has merely been hinted at in this chapter—relates to the conceptual level or order at which each conception is constructed. Accordingly, before pronouncing on the nature of the change between Hobbes's and Locke's conceptions, something must be said about that point.

CHAPTER 7:
CHANGE ACROSS RULE OF LAW CONCEPTIONS:
A REVOLUTIONARY CONCLUSION'S MEANING AND IMPLICATIONS

INTRODUCTION

Approximately 76,000 words ago,¹ I posed my research question: *What is the nature of the change across Rule of Law conceptions?* I then took some time setting out original ways to view both the problem in the current literature and the problem / solution approach as a potential remedy. After taking some time to provide a novel definition of the Rule of Law and exploring two canonical ideas of the Rule of Law (via the problem / solution methodology), I came to some original conclusions regarding the differences in those accounts. After doing all of that, my answer to the research question I posed is: 'revolutionary'.

As a conclusion, I suspect this single word is both uninspiring and unsatisfactory. So, by way of some concluding comments, I will spend this—very brief—chapter unpacking both what I mean *and* what this means.

¹ 76,339, to be precise.

WHAT I MEAN (BY 'REVOLUTIONARY' AS AN ANSWER)

In one sense, I am sure that it is clear what I mean by 'revolutionary' being the answer to the question; change across ideas of the Rule of Law—specifically across Hobbes's and Locke's accounts—has occurred in a way that reflects the definition of 'revolutionary' that I provided in Chapter 2:

Revolutionary change describes discreet, unrelated, iterations of the Rule of Law as paradigm shifting events: conceptual revolutions in thought that fundamentally alter or change the way a concept is perceived; subsequent ideas are *not* necessarily reliant on earlier ideas; later ideas implicitly or explicitly supplant earlier ones.²

This (binary) conception of change as being either evolutionary or revolutionary stems from evolutionary change *necessarily* relating to a previous idea; if there is no necessary connection to prior ideas, 'change' is revolutionary. Because the change between Hobbes's and Locke's ideas of the Rule of Law has no necessary connection, change is revolutionary.

This conclusion follows simply because there is a conceptual and fundamental difference between the nature of the two accounts. Locke's account can, and must, be clearly differentiated from Hobbes's as a result of

² Chapter 2: *Change (Over Time and by Thinker) in Rule of Law Ideas*.

both the difference in the content of the (first-order) account and the caricatures of the accounts,³ as well as the difference in the accounts' disambiguated contextual (problem / solution) content.⁴ In short, in the absence of importing some wider–presentist–conception of an overarching concept of the Rule of Law into which we can–perhaps, somewhat unthinkingly–deposit both accounts, there is no reason to draw a necessary connection between the two.

There is clearly a contest that exists in the Rule of Law literature regarding the meaning and content of the concept of the Rule of Law.⁵ However, notwithstanding the analytical rigor of the contest, the underlying assumption that it is appropriate to include all of the usual suspects of the Rule of Law in the same overarching concept is flawed. Assuming that each of the canonical authors is talking about the same thing is, of course, a stretch at best when a majority of the authors (including canonical authors like Aristotle, Hobbes, Locke, and Fuller) make no mention of 'the Rule of Law' in any recognisable sense. What I have sought to demonstrate is that some of the most important Rule of Law thinkers should not–despite this obvious

³ See Chapters 3, 4, 5, and 6.

⁴ See Chapters 4, 5, and 6.

⁵ See Chapter 3.

difference—be considered as talking about the same thing. In re-capping why this is the case, I will put to one side the obvious first-order differences that exist.⁶ After all, these are well known and, it seems, largely ignored in terms of illustrating that these canonical authors should *not* be considered as all talking about the same thing. Instead, I will focus on the original arguments made in Chapter 6 relating to the contextual differences in the nature of Hobbes's and Locke's accounts.

Hobbes's and Locke's accounts can, and must, be both differentiated and disambiguated.⁷ When this happens, it becomes clear that they are not, nor should they be conceived as, talking about the same thing; this is the case even where there are superficial similarities in the conceptions. Hobbes's and Locke's Rule of Law-like conceptions relate to very different ideas by virtue of the very different problems to which they respond; these problems can assist in identifying forms of conceptual change.⁸ The nuance that the problem / solution methodology brings provides a filter to discard various aspects that are *unnecessary* to subsequent conceptions. In this sense, and as is the case with Hobbes and Locke, the fact that the two accounts differ in

⁶ These were dealt with at length in Chapters 2 and 3.

⁷ See Chapter 6.

⁸ See Chapter 6: *Conceptual Comparisons as Conceptual Change*.

their most fundamental natures, and because they provide answers—in different or differing terms—to different questions, illustrates that Hobbes's account is conceptually *unnecessary* to the Lockean account. The absence of any necessary connection renders the form of change between these two accounts as being not-evolutionary; and, therefore, revolutionary.

WHAT THIS ALL MEANS (FOR THE RULE OF LAW)

There are two ways to view the title to this part. I could mean what this all means for the Rule of Law in terms of our appreciation of the meaning of the concept (generally); or, I could mean in terms of the use, application, and operation of the concept (in either analytic or practical terms). Whilst they are, of course, related, I will deal with them individually.

Meaning for our Appreciation of the Concept

The debate regarding the content of the Rule of Law, and the associated debate regarding the use and application of the usual suspects of the Rule of Law, is ongoing and unlikely to progress substantially. The general acceptance of the concept as being essentially contested means that the various first-order differences will not, and likely cannot, be resolved without a reassessment of the way in which Rule of Law-like accounts are discussed,

debated, and differentiated.⁹ One of my aims in considering the research question in this thesis was to provide some alternative ways in which the usual suspects of the Rule of Law can be differentiated as part of the ongoing debate. Differentiating accounts through the methodologies I have generated provides one way for the debate to move forward; it provides a way for the discussion to consider the same thinkers—and perhaps even some new ones—in further efforts to refine the idea of the Rule of Law.

The new methodologies I have conceived and applied—the problem / solution approach in Chapter 2, and the distillation of Rule of Law elements in Chapter 3—are of wider import. Whilst each has been applied to Hobbes and Locke, they can be broadened to apply to any other ‘canonical’ account. This is, however, not the only potential impact on the future appreciation of the concept. The provision of a methodology to identify *other* Rule of Law-like ideas means that it may be possible to identify—with a level of analytical rigour that could be seen as lacking in relation to some of the present canons—a number of *other* thinkers that provide Rule of Law-like ideas.

⁹ For discussion of this point as a Common Assumption, see Chapter 2. For an exploration of the nature of the contest, see Chapter 3.

This potential influx of *other* thinkers' conceptions could be criticised for fear that it will generate a mass of conceptual confusion; however, the application of my other methodologies will assist in differentiating the various conceptions into different categories of the Rule of Law. In effect, being able to more cogently identify differences (that extend to *both* the problems that the solutions are focused on solving as well as the solutions themselves) extends some additional level of clarity to the debate—even an extended debate—regarding the meaning and content of the concept of the Rule of Law.

Meaning for the Use, Application and Operation of the Concept

Whilst a level of analytic rigour and clarity can be brought to the Rule of Law debate through the consideration of the ideas contained herein, there is also a way in which my thesis may assist in clarifying the use, application, and operation of the Rule of Law. If the concept's analytic meaning is reconceived in terms akin to my argument, a broader, yet clearer, idea of the Rule of Law could emerge. This is, of course, unlikely to happen based on this thesis alone. This is not merely a result of the general lack of impact associated with a PhD thesis, but is due to the limited scope of the study I have conducted. In order to—sensibly—impact any re-conception of the idea of the Rule of Law more generally, a consideration of far more thinkers—and

more pairs of thinkers—must be undertaken.¹⁰ Doing so would result in an appreciation of the nature of change from thinker-to-thinker that would enable a re-conception of the overall nature of the concept. Of course, given the potential inclusion of a large number of other thinkers, this may be a life's work.

My argument cannot be seen as practically focused. The practical application of the Rule of Law—in terms that reflect the U.N.'s position¹¹—is often, contemporarily, inclusive of substantive or 'thick' ideas of the Rule of Law. These ideas, like democracy, human rights, or justice, play no part in the formal consideration of the concept that I have explored. However, as noted earlier, these 'thick' ideas are generally grounded on a base of 'thin' ideas about what the concept is. Accordingly, if the fundamentals of the 'thin' idea are shifted in the way that I have suggested, it is nevertheless possible for some impact to flow through to the practical application of the Rule of Law.

¹⁰ I explore some suggestions for further research below.

¹¹ For one example of the U.N.'s idea of the Rule of Law, see UN SECURITY COUNCIL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES - REPORT OF THE SECRETARY-GENERAL 6 (2004), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (last visited Jul 20, 2018). See also my brief comments in relation to this conception in Ch. 2: *Change (Over Time and by Thinker) in Rule of Law Ideas*.

This brings up one, last, fundamental consideration in relation to the meaning of the Rule of Law and, more specifically, the potential for my thesis to impact—practical or operative—Rule of Law thinking. This can best be put in terms of a question: How can a focus on accounts from 17th Century England possibly hope to influence and impact the contemporary idea of the Rule of Law?

There is a glib, and a not-so-glib, answer to this question. The glib answer is simply: 'I didn't start it.' The question, when raised in this context, seems to be a valid one; after all, what can we possibly hope to learn from exploring these philosophical positions from a long-gone era, from societies that do not resemble our own. However, by saying 'I didn't start it', I point to the fact that the use and application of these 17th Century ideas—and many older ones—remains a key and core part of the contemporary Rule of Law debate. So, for the glib answer, my point is simply that I am working within the confines of the *current* debate, notwithstanding the accounts' historical nature. The glib answer can also be extended. By introducing the methodologies that I have, my precise point is to ensure that the problems to which the thinkers' solutions are applied *do* match the contemporary Rule of Law idea. The approach I am advocating in many senses would address the (hypothetical) questioner's concern; the obvious result of a Hobbesian or

Lockean contextual analysis—where the problems that each thinker could perceive were borne of a period of unprecedented turmoil that *does not* exist anywhere in the Western world today—would be the whittling down of their ideas to apply *only* the aspects of their thought that *could* be seen to mirror contemporary society.

My not-so-glib answer brings in aspects of my previous comments regarding the thin / thick application, my glib answer, and the general contest that exists in the debate. Where the contemporary ideas regarding the Rule of Law are built on and already draw in historical accounts, it makes analytical sense to attempt to determine *why* those accounts should remain relevant. The approach advocated through the methodologies that I introduce provides the tools to critically evaluate the inclusion of those historical accounts. In a second sense, the use, inclusion and consideration of historical figures like Hobbes and Locke could be seen as being purely illustrative. By considering only these two thinkers, I have not suggested that their accounts are any more (or less) canonical than the accounts of other usual suspects. Not only is the consideration of Hobbes and Locke a single step along a process of considering other thinkers, but they are used merely as an illustration of how a particular—and different—way of thinking about the Rule of Law may be conducted.

In considering my responses and comments above, it will be apparent that I have focused on the various methodologies that I have introduced and have not discussed the issue that takes centre stage as part of the title of my thesis: conceptual change. It is this aspect, however, that may facilitate the most impact on the meaning and operation of the Rule of Law. The idea of change across conceptions of the Rule of Law is not new. As noted in Chapter 2, it represents one of the Common Assumptions of the Rule of Law. The nature of the change—from conception to conception, or generally across the concept of the Rule of Law—has, however, not previously been explored in any substantial depth. Accordingly, other than the fact that it is recognised that there are differences from conception to conception, little attention is paid to the nature of those differences. By providing a framework in which to consider the nature of change—as being evolutionary or revolutionary—it is possible to see more clearly the nature of some of the differences that exist.

My examination in the chapters above illustrates that the change between Hobbes and Locke, notwithstanding their temporal and geographical similarity, was conceived as being revolutionary: no necessary connection exists. This is not necessarily universally true. Conducting a similar analysis across *other* pairs of Rule of Law-like thinkers may reveal evolutionary connections. This could lead to genealogies of types of Rule of Law accounts

being identified. This process would provide analytical rigour, and potentially a way to disambiguate between accounts, in a way that is not presently possible when all of the accounts are simply placed in a large and single Rule of Law bucket (as they are now). On this basis, the identification of forms of change—whether the accounts are historical or contemporary—provides substantial analytic benefit to the Rule of Law debate.

WHAT'S NEXT?

The vastness of the debate, scope, and volume of original material relating to the Rule of Law cannot be underestimated. No single work can hope to bring order to this particular brand of chaos. In providing the arguments and methodologies that I have, a small step has been taken. But many more are required. The task is so herculean that even the process of suggesting some next steps must be considered as being incomplete. Accordingly, I limit my comments and suggestions to relatively abstract ideas.

A logical next step, as hinted at above, is to conduct an analysis equivalent to the Hobbes / Locke assessment in respect of *other* pairs of Rule of Law-like thinkers. By considering each thinker in terms of each *other* thinker, connections between ideas that had not previously been apparent may be revealed. The assessment of each Rule of Law-like thinker—perhaps

starting with the canonical thinkers before considering *other* potentials—in terms of the solution provided and the motivating-problems would afford a way to compare each set of problems and identify, as I have done with Hobbes and Locke, commonalities. This would allow the change between each pair of thinkers to be identified as being evolutionary or revolutionary. Should it be that *all* of the accounts are identified as being revolutionary, that would of itself be an interesting finding; however, intuitively, this seems like an unlikely event. Should *any* evolutionary connections be identified, this would allow the creation of a historical conceptual map that traces trends in conceptions over time. This would be a tremendously useful way to conceive of the conceptions' development and overall change.

The above suggestion relates to the conceptual and temporal-extension of the analysis of the Rule of Law. This does not, however, address one of the most interesting aspects: the geopolitical and cultural difference in Rule of Law-like ideas. One thing that was alluded to in early chapters was the fundamental Anglo-American-ness of both the concept of the Rule of Law generally, and the subsequent consideration of the debate herein.¹² If the

¹² See Chapter 2: *Introduction*. For an exploration of this aspect, as a problem in relation to the international Rule of Law, see Paul Burgess, *Deriving the International Rule of Law: an Unnecessary, Impractical and Unhelpful Exercise*, (FORTHCOMING).

scope of what is to be considered as a Rule of Law-like idea is extended beyond the list of (favourite Anglo-American) thinkers responsible for the majority of the canon of the Rule of Law, the inclusion of non-Anglo-American ideas seems both likely and desirable. The Rule of Law itself is seen as, and is derived from, fundamentally Anglo-American ideas and the debate about the conceptual content of the Rule of Law is conducted fundamentally across the English-speaking literature. This is not to say that non-Anglo-American ideas that could fall within the ambit of Rule of Law-like ideas do not exist. They do. The extension of the conceptual category would facilitate a wider appreciation of the idea and, hence, allow what are seen as cognate ideas (like the *Rechtsstaat* or the *Etat de droit*) to be brought—usefully—under the conceptual banner. Their inclusion, much like the application of the other methodologies outlined above, would enhance our analytical rigour, as well as our appreciation and understanding of the Rule of Law more generally. And, after all, this was exactly what I wanted to do when I set out to write this thesis.

AVOIDING (UNINTENDED) CONCEPTUAL EUGENICS

Only a few loose ends require tying up. In Chapter 1, in considering the rationale for continuing to discuss the meaning and content of various Rule of Law conceptions, I raised a number of questions:

Do we know—and do we care—exactly where (or when) the tools came from? What, exactly, were the tools originally intended to be used for? Why are *these* tools in *this* box? And, what exactly did the person who originally deposited them mean to communicate?¹³

In that chapter, I illustrated the relevance of the questions through a tool analogy relating to the repurposing of butter knives and flat-head screwdrivers. In the cut-and-thrust of my argument in the last five chapters, I have answered each of these questions. However, I want to draw specific attention to a related point that I raised later in that chapter. In suggesting that the result of my approach will afford clarity as to why a particular tool is included within the toolbox, I then said:

What's more, it seems conceivable that an increased focus on the history of Rule of Law conceptions will not only illuminate what *is* in the toolbox, but it may also illuminate what *is not* presently accepted as being in the box (but perhaps was intended to be included by original thinkers).¹⁴

This was exactly what happened. The focus on what is *not* included in the Rule of Law's conceptual toolbox provided a vitally important point of focus. In examining Hobbes's and Locke's accounts, I identified that the

¹³ Chapter 1: *A Neglected Origin*.

¹⁴ Chapter 1: *Our Conceptual Toolbox*.

toolbox that each thinker is taken to be using is incomplete; there are a number of things missing that are not evident on a standard appreciation of the conceptions; these, however, become evident when considering the accounts in terms of a problem / solution methodology.¹⁵ Further, it is clear from exploring the context of the accounts that each thinker meant their account to include these—otherwise unappreciated—aspects.

Through illuminating both the presence and relative absence of conceptual tools, it is possible to attain a more thorough understanding of the meaning of Rule of Law conceptions. Through gaining this appreciation, and by understanding the mechanisms of change that have operated between conceptions, the dire consequences that may follow from the neglect of conceptual origins may be avoided; subsequent change in Rule of Law Conceptions, whether by evolutionary or revolutionary means, will occur only in a way that is fully intended and appreciated; and, (unintended) conceptual eugenics will not occur.

¹⁵ Here, I mean the aspects that relate to the solutions to the problems that illustrate there is much more that each thinker meant to address with his solution.

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